UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

HENRY W. BOERNER, Individually and as Administrator of the Estate of Mary Jane Boerner, Deceased,	.	
Plaintiff,	.	
v.	.	No. 4:98CV00427JMM
BROWN & WILLIAMSON TOBACCO COMPANY,	.	Friday, May 16, 2003 Little Rock, Arkansas 9:10 a.m.
Defendant.	.	

VOLUME 9
TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE JAMES M. MOODY
United States District Judge, and a jury.

APPEARANCES:

On behalf of the Plaintiff:

WILLIAM GARY HOLT, ESQ.
RUSSELL MARLIN, ESQ.
Gary Eubanks & Associates
708 West Second Street
Post Office Box 3887
Little Rock, Arkansas 72203-3887

NORWOOD S. WILNER, ESQ.
GREG MAXWELL, ESQ.
Spohrer, Wilner, Maxwell & Matthews
701 West Adams Street, Suite 2
Jacksonville, Florida 32204

Eugenie M. Power, RMR, CRR, CCR
United States Court Reporter

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On behalf of Defendant:
BRUCE G. SHEFFLER, ESQ.
JOSEPH G. FALCONE, ESQ.
Chadbourne & Parke
30 Rockefeller Plaza
New York, New York 10112

KEVIN A. CRASS, ESQ.
Friday, Eldredge & Clark
2000 First Commercial Building
300 West Capitol Avenue
Little Rock, Arkansas 72201-3493

Proceedings reported by machine stenography; transcript prepared by computer.

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EXHIBITS:

Defendant Exhibit Nos. 520, 557, 909, 914, 1979, 2198, 2210, 2230, 2231, 2232, 2233, 2234, 2236, 2237, 2239, 2240, 2241, 2242, 2254, 2256, 2257, 2287, 2288, 2502, 2503, 2513, 2525, 2609, 2787, 2788, 2801, 2802, 2804, 2809, 2811, 2812, and 2813 1496

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P R O C E E D I N G S

(Jury not present.)

THE COURT: Good morning. We're on the record. And before I brought the jury in, I just wanted to receive into the record the exhibits to which there have been stipulations just so we keep the record current on that.

And I'm going to receive Defendant's Exhibits 520, 557, 909, 914, 1979, 2198, 2210, 2230, 2231, 2232, 2233, 2234. 2235 has already been received. 2236, 2237, 2239, 2240, 2241, 2242, 2254, 2256,
2257, 2287, 2288, 2502, 2503, 2513, 2525, 2609, 2787, 2788, 2801, 2802, 2804, 2809, 2811, 2812, and 2813.

(Defendant Exhibits 520, 557, 909, 914, 1979, 2198, 2210, 2230, 2231, 2232, 2233, 2234, 2236, 2237, 2239, 2240, 2241, 2242, 2254, 2256, 2257, 2287, 2288, 2502, 2503, 2513, 2525, 2609, 2787, 2788, 2801, 2802, 2804, 2809, 2811, 2812, and 2813 received in evidence.)

THE COURT: Okay. Are we ready for the jury?

MR. CRASS: Your Honor, just to be clear, I think there was some question before we started today about whether 2505 had been received, and I think counsel for plaintiff and I agree that it was received and we just wanted to confirm that.

THE COURT: Yes. I think it has already been received.

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MR. CRASS: Yes. Thank you.
THE COURT: I didn't go over the ones that I received yesterday.
MR. CRASS: Okay. Thank you, sir.
THE COURT: Good morning, Dr. Harkness.
(Whereupon the jury entered the courtroom and proceedings continued in open court as follows:)
THE COURT: Good morning. You may be seated.
Okay. Mr. Wilner.
MR. WILNER: Thank you, Your Honor. May it please the Court.

CROSS-EXAMINATION

BY MR. WILNER:

Q. Is it Mr. Harkness or Dr. Harkness?
A. Call me either. Doctor. I do have a Ph.D.
Q. Not a medical?
A. Not a medical degree.
Q. You and I have never met?
A. Correct.
Q. I've never heard of you, you've never heard of me?
A. I've heard of you.
Q. Oh, okay. Hope it's been good. American Tobacco told you about me?
A. Their lawyers, Chadbourne & Parke, and just reading your name in the news.

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Q. Okay. Well, hopefully, it was fair, and I'll try to be fair to you.
A. Okay. Fair enough.
Q. Tell me, Mr. Harkness, when you first got involved in this project, you must have seen some attorney from American Tobacco Company.
A. From Chadbourne & Parke.
Q. And they represent the American Tobacco Company, right?
A. I think so, or Brown & Williamson, which holds American Tobacco. I'm not an expert on the corporate inner-connections. But, yes.
Q. And this was six years and $300,000.00 ago?
A. Yes. Uh-huh.
Q. And they came to you and asked you to do some research project --
A. In essence, yes.
Q. -- which involved running all around the country?
A. Well, I decided that it made sense to run all around the country, and they agreed to let me do it.
Q. So, did you ever ask them why they wanted this research done?
A. No. I mean, they told me why.
Q. Oh. What did they tell you?
A. That they were wanting a historian with my set of qualifications, a historian of science, to, first of all,

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offer my opinion whether there was a controversy in the scientific community, and then do research on the nature and extent of the controversy in the 1950s, early 1960s.

Q. Why did they want to know that?

A. You'd have to ask them.

Q. You didn't know?

A. I didn't press for an answer.

Q. Oh, you mean you asked them. They didn't tell you and you didn't press them?

A. No. Just didn't come up.

Q. Here's a tobacco company, comes to you, says: "All right. We're going to give you, you know, basically" -- was it like a blank check, whatever you wanted?

A. I submitted -- no. I spent -- they paid me for my time.

Q. So you said, "All right. I'm going to work on time." And did they give you a budget? Did they say, "Don't go over, you know, like $300,000.00, but you can't spend 400-", or they said, "Just go out and do what you want"?

A. There was no specific budget.

Q. Now, in the business world today, most people work on a budget, don't they?

A. I'm not a businessman. I'm a historian.

Q. Well, have you ever had a client, or have you ever done any kind of work for somebody where you just said, "I'm just going to charge you whatever it costs, and I'm not bound by

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anything"?
A. No.
Q. This is the first one, isn't it?
A. Yes.
Q. So a tobacco company comes to you and says, "All right. I want -- we want this work done on whether there was a controversy, and you just go out there and do whatever you want," and you never ask them, "Well, why do you care?"?
A. Right.
Q. So you went out to determine if there was what you call a controversy, right?
A. Yes.
Q. Now, tobacco really wasn't your field before this, right?
A. No. Tobacco still isn't my field. History of medicine is my field.
Q. So you don't -- well, in particular, the history of pulmonary medicine is not really your field, right?
A. No.
Q. Okay. I mean, your publications go to -- and they're excellent publications. I'm meaning no disrespect. In all fairness, your publications have not been on any anything to do with tobacco.
A. Correct.
Q. You've talked about -- and one of your publications was "Experimentation on American Prisoners and the Nuremberg

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Medical Trial"?
A. Yes.
28 Q. Which is a very serious issue, is it not?
A. I think so, yeah.
29 Q. "The History and Practice of Bioethics Commissions."
Bioethics is a very serious business, isn't it?
A. Yes.
30 Q. You did "The Significance of the Nuremberg Code,"
Nuremberg being the location in Germany where the war
criminals from World War II were tried, right?
A. Right.
31 Q. And you really specialize kind of in this wartime,
Nuremberg: "Nuremberg and the Issue of Wartime Experiments,"
"Prisoners and Pellagra," "Vivisectors and Vivishooters:
Medical Experiments on American Prisoners," and The Ethical
Dimensions of the Biological Sciences. You've done some work
in ethics, too, haven't you?
A. Yes.
32 Q. Ethics really is doing the right thing, isn't it?
A. One way of looking at it, yes.
33 Q. Did American Tobacco ask you to determine or to give an
opinion whether they did the right thing?
A. They asked me to look at the nature of the controversy
and how American Tobacco was following that controversy. It's
not really a historian's job to go back and judge whether

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specific actors in the past were right or wrong.
34 Q. Well, I understand all that, but your -- in addition, you have all this training in ethics, right?
A. I've looked at the history of medical ethics. I don't possess qualifications as an ethicist. I don't, so to speak, hang out my shingle as an ethicist. I'm a historian.
35 Q. "Laying Ethical Foundations for Clinical Research," you wrote, Bulletin of the World Health Organization. What was that about?
A. That was about the history of an important article, published by a medical researcher named Henry Beecher in the mid 1960s and about the impact of that article. So it was looking at the history of that statement on research ethics.
36 Q. Okay. So you -- although you don't hold yourself out as an expert in ethics, you're kind of an expert in how ethics came to be, the history of ethics?
A. Medical ethics, research ethics, yeah.
37 Q. Okay. Research ethics. All right.
A. Research ethics with respect to human experimentation.
38 Q. All right. Before you narrow it, that's part of what you call research ethics. Are you going to stick with research ethics? Are you an expert in that?
A. No, I'm going to narrow it to the history of ethics with respect to human experimentation. I mean, that's -- I mean, in my work in the history of ethics. But I've also done

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broader work on the history of medicine.
39 Q. Okay. Well, let me just see if whether or not American Tobacco -- let me see if I -- maybe I wasn't clear the way I asked it. Did American Tobacco ask you, as part of this six years, $300,000.00, to make any kind of a historical evaluation of whether they had been ethical at any point in time?
A. Not in those terms, no.
40 Q. Not in those terms?
A. No.
41 Q. Well, did you -- surely when you went through all this stuff, it was popping into your mind, wasn't it?
A. Well, I was looking at the actions of American Tobacco Company within the context of the times of the 1950s and early 1960s.
42 Q. So what you're saying is, you were looking at their ethics within the context of the times? Is that fair?
A. Yes, yes.
43 Q. And --
A. Ethics isn't really the way I was approaching it, but I'm not going to dispute that.
44 Q. Now, just tell me how this worked. Six years from the time you saw -- who first contacted you from American Tobacco or Chadbourne & Parke or Brown & Williamson, or whoever it was?

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A. Chadbourne & Parke, a lawyer named Steve Vollins.
Q. Okay. When was that?
A. That was April, 1997.
Q. I believe Mr. Vollins was in the Carter v. Brown & Williamson case in Florida that I tried. Did he tell you about that?
MR. SHEFFLER: Your Honor, I would object to that.
MR. WILNER: We'll withdraw it. Just conversation.
THE COURT: Sustained.
BY MR. WILNER:
Q. So you met with a Mr. Vollins from Chadbourne & Parke back in 1997?
A. Yes.
Q. Okay. And did he give you a written specification?
A. No.
Q. Did you give him a written proposal?
A. No.
Q. Have you ever worked on any kind of a grant where you didn't even have to tell them -- you didn't even have to submit a proposal in?
A. No.
Q. Well, did you think it a little bit odd that somebody was coming to you with a blank check, you don't have to come up with one written proposal, you don't have to come up -- did you have a deadline?

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A. Nothing specific.
Q. No deadline. Did you tell them who was going to be working on your staff?
A. No. I was -- I was the only guy. I was an independent researcher.
Q. You've applied for grants before, right?
A. Yeah.
Q. That's not how you do it, is it?
A. Actually, it is, as a historian.
Q. You just go in and say you want some money?
A. In terms of an individual historian. Most historians don't have staffs.
Q. Regardless of the staffs, you tell them what you're going to do and you give them an idea of what it is going to cost?
A. That's the general way it works in academics.
Q. Except in this?
A. This was different.
Q. This wasn't academic, was it?
A. This was not an academic-granted source of funding for research.
Q. Did Mr. Vollins tell you the reason they needed you to come in and testify was because they were being sued by people who had been killed by their products and they were being charged with not putting a warning on when they should have?
A. In so many words.

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60 Q. So you knew that the purpose of your research would be to come in and explain to the jury that American Tobacco was not guilty of failing to put a warning on?
A. That isn't -- I mean, Steve Vollins initially said, "Look, you take a look at this subject. I'm not going to tell you whether there was a controversy. You look at it, spend some time with it, see if you think it was a controversy, and let's talk again."
61 Q. So he wanted you to go out and kind of take a look around, and if you came back and it looked like you were on the right track, this thing was going to go forward?
A. That's a way -- -- reasonable way of putting it.
62 Q. If it came back and you said, "Hey, Mr. Vollins, I don't know. I think this evidence was pretty darn clear to the American Tobacco Company and to anyone who would look for it," well, you wouldn't be on your 300,000-dollar track, would you?
A. I don't know. You'd have to ask them.
63 Q. Well, now, I would, really? Do you think they would have financed you for six years if your opinion was that the medical literature was so darn clear that there was no excuse for what they did?
A. Well, it's sort of a moot question. I mean, it was very clear to me at the outset that there was a controversy.
64 Q. And you told that to Mr. Vollins, right?
A. That there was a controversy, that my initial findings,

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yes, that it did look like a controversy, and an interesting one at that.

65 Q. How many times did you have a meeting with Mr. Vollins or anyone from Chadbourne & Parke or American Tobacco to keep them updated on how you're doing?

A. I don't have an exact tally. You know, four or five times a year, I suppose, over the years.

66 Q. Four or five times a year for six years. That's like 35 times you met with these lawyers.

A. Well, four or five. I mean, yeah. I mean, I think it is a little less than that, if you do the math. But something in that ball park, yeah.

67 Q. Okay. Six times five is 30. Should we use 30?

A. Sure.

68 Q. Thirty times you met with the lawyers?

A. Yes. Once every couple of months, on average.

69 Q. Did you give them a report?

A. A verbal report, generally, yeah.

70 Q. You kept all this in your head?

A. I kept a lot of photocopies, made some notes, made a lot of notes. But mainly photocopies. That's how I do my research.

71 Q. No listing of your opinions?

A. There have been documents that have been prepared listing my opinions for various trials in which I've been entered as a

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witness. That's happened a few -- I mean, I don't know if I have the right term of art for the legal realm, but I've been listed as a witness in various previous trials, but I've never actually gotten to the point of testifying before. So I think there are witness statements, or something like that.

72 Q. So you've been listed as a witness in other cases involving this American Tobacco Company?

A. Yes.

73 Q. And they told you they were going to list you as a witness?

A. Yes.

74 Q. You said that was okay?

A. Yes.

75 Q. How many times has that happened?

A. I don't have an exact count. Four or five times.

76 Q. And this is your debut, so to speak?

A. So to speak. Here I am.

77 Q. Okay. So when you met with these lawyers from the American Tobacco Company, did they give you information from the American Tobacco Company, from the files of the American Tobacco Company?

A. No. They -- it was clear that -- and this is the way I wanted it, that I was doing the research, I was gathering the information. It was an independent research project in that sense.

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78 Q. Well, it might have been independent. I'm not challenging that, sir. But my question is, did you ask for information that was within the company that maybe, you know, no one else would have the ability to see?
A. No. I was able to gain access to a lot of information on the web.
79 Q. Okay.
A. Using that website, the American Tobacco website.
80 Q. So if it was posted on the web, you had access to it, right?
A. Yeah.
81 Q. If it wasn't posted on the web and it belonged to American Tobacco, you did not?
A. Correct.
82 Q. So they never came to you and said, "Look, just to make sure that you see everything, we're going to open up our files to you so you can look at our internal documents to make sure, if you're going to give an opinion, that we did the right thing"?
A. I know what I think, but I'm not sure whether the answer, or the question is -- they never showed me the documents, yeah.
83 Q. Had you ever asked?
A. No.
84 Q. How do you know the ones on the web were the ones, you

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know -- I mean, how do you know that the ones on the web were the ones that you really needed to see?
A. Well, I mean, there's a pretty extensive collection there. I was satisfied that it was a reasonable representation of what was going on in American Tobacco. There are letters marked "confidential," that sort of thing, on the website.
85 Q. Who decided what to put on the website, what not to?
A. I don't know.
86 Q. You never even asked that?
A. No.
87 Q. So you just went to the website and said, "Well, I'm going to trust the person who decided to put these on, and they look okay to me"?
A. Yeah. There was plenty there to keep me busy. There was still more I wanted to look at.
88 Q. Okay. Now, when you went on the website -- you called it "the website." And you're talking about the website for the American Tobacco Company, right?
A. Right.
89 Q. Which is actually the website for Brown & Williamson Tobacco Company, right?
A. Right.
90 Q. In fact, you get into what is "brownandwilliamson.com"?
A. Yeah, something like that.

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91 Q. Then you work your way through, and it's got a document room, and then you go into that, and then it allows you to go into either Brown & Williamson or American Tobacco, right?
A. Right, right.
92 Q. But also it has, I think, as I remember, on the left --
A. We've probably both spent a lot of time looking at that screen.
93 Q. Yes, sir. On the bottom it's got a place to click where you go into a website where all the documents in the whole tobacco industry are -- well, all the ones that were put on are there.
A. Yeah. I'm not sure that is on that opening page, but I'm aware of the other websites, yeah.
94 Q. So on that bigger website, or those series of websites that you can link to --
A. Yep.
95 Q. -- is the Tobacco Institute, right?
A. Yeah. I have spent some time with that website, as well, looking at the early history of the TIRC and the SAB.
96 Q. Okay. There's the CTR, which used to be known as the TIRC.
A. That's the one I spent time on.
97 Q. There's a different one called the TI, the Tobacco Institute.
A. I have not been on that one.

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98 Q. Did you know there was a difference?
A. Yeah. But I wasn't -- the Tobacco Institute's, I just haven't spent any time looking at.
99 Q. They were the big lobbying and public relations people, the TI.
A. Uh-huh.
100 Q. Wasn't that important to you?
A. Well, most of my research was focused on the scientific aspects of the, you know, the story.
101 Q. Well, you brought out documents from Elliot Richardson. He was no scientist. He was a politician, right?
A. Yeah. But I'm sure he drew on scientists within the HEW to formulate that comment.
102 Q. And you're not suggesting that the tobacco industry didn't have one hell of a lobby?
A. I think they probably did.
103 Q. And that they lobbied Congress, right?
A. Right.
104 Q. And you're not suggesting that any political questions that get answered in Washington at times material were not affected by the tobacco lobby?
A. I think the tobacco lobby was involved in a lot. Also, I know that Elliot Richardson was a man of deep principle and conviction. The Saturday Night Massacre certainly establishes that with great clarity. That's the episode in Watergate that

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I'm sure you're familiar with.
105 Q. I don't really remember the details.
A. Should I go into them?
106 Q. Do what?
A. Should I go into them?
107 Q. Into Watergate? How long do you want to be here? Let's just stay on tobacco.
MR. SHEFFLER: Your Honor, can we have a question and answer?
THE COURT: Yes. Let's go back to a question and answer.
MR. WILNER: Sure.
BY MR. WILNER:
108 Q. I'm just curious. So you never even looked at the TI, the Tobacco Institute, but you know what it is?
A. Right.
109 Q. You know Earle Clements? You know who that is?
A. Actually, I don't recognize --
110 Q. Senator from Kentucky, in charge of the TI?
A. Don't know.
111 Q. Biggest, baddest lobbyist in Washington, D.C. Not part of your --
A. No. When did he serve?
112 Q. In the '70s.
A. No, that's beyond the chronological scope of my project.

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113 Q. Okay. Well, also, in that website is the TI, the CTR, and then there's R. J. Reynolds. Do you know who they are?
A. Yeah. I spent a little time at that website, looking again for documents related to the early history of the TIRC and -- that's the Tobacco Industry Research Committee -- and the SAB, the Scientific Advisory Board, because there are some documents of relevance on that RJR website.
114 Q. Phillip Morris, right?
A. Yeah. Again, just for that early slice of the TIRC/SAB.
115 Q. Well, the R. J. Reynolds had scientists that at the times you were talking about were working on the very issues that you've considered. Did you know that?
A. Not in any detailed fashion, no. I just haven't looked at the other tobacco companies.
116 Q. Well, you had access to the website, right?
A. Right.
117 Q. So did you figure out who the main scientists were at R. J. Reynolds and what they found out in the '50s and '60s about whether cigarettes caused cancer?
A. No.
118 Q. Didn't care?
A. Just haven't done it.
119 Q. Just hadn't gotten to it yet?
A. I've been looking at American Tobacco. That's a big enough project, and, quite frankly, I'm still not done with

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it. There's a lot there.
120 Q. If scientists from R. J. Reynolds and scientists from Phillip Morris and scientists from the old Brown & Williamson were working on exactly the issues that you're talking about, wouldn't that be relevant to what you're trying to accomplish in this six-year project?
A. Perhaps. But I have not done it. That's the fact of the matter.
121 Q. All right. Okay. So let's -- but you have -- you have looked at American Tobacco?
A. Yes.
122 Q. All right. Well, let's start -- since we have to start somewhere -- you've also -- I almost forgot. In addition to looking at American Tobacco's own website documents, you've looked at the published literature by scientists who have written articles on tobacco and cancer, and tobacco and other diseases, and published them in journals, right?
A. Yes.
123 Q. Have you collected them?
A. Yes.
124 Q. Got them with you?
A. Some, not all.
125 Q. Got them in, like, a binder so we can go through them?
A. No, I don't -- I mean, I have file folders. I don't have -- I mean, my office file cabinets are full of these things,

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but I just -- I just didn't bring all of them with me.
Q. Okay. Well, let me -- now, you talked a lot about what people's different opinions about what the literature showed. Maybe it would be for -- or, are you conversant, are you aware of the actual hard science that was in these periodicals?
A. Yes. I mean, I'm not an epidemiologist. I'm not going to present myself as a trained epidemiologist. I can, you know, read the articles and I can understand them, to a reasonable level of clarity.
Q. Okay. Well, do you have with you then the article entitled, "Carcinoma of the Lung," by Alton Oschner and Michael DeBakey, which was published in Archives of Surgery, 1941?
A. '41? I think I do have that article with me. I'm not going to have all of them with me. But I do have that one.
Q. I understand the limitations of space, especially if you're traveling, but maybe you've carried the ones that are most significant to you.
A. I have some, yes.
Q. Would you get yours out so we can read along?
A. Sure. Just give me a second here.
Q. Okay.
A. It was right on the top.
Q. It was on the top? So this was pretty important, huh?
A. Well, I have them in chronological order.

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132 Q. Okay. Let me show it. This is what you've got.
A. Yes, it is.
133 Q. What's "carcinoma"?
A. Cancer.
134 Q. Who was Alton Oschner?
A. As we talked about yesterday, he was a surgeon in New Orleans.
135 Q. Who is Michael DeBakey?
A. Similarly, a surgeon in New Orleans, Alton Oschner's subordinate.
136 Q. These were pretty important guys as their career matured, weren't they?
A. Yeah. Oschner was important at the time. DeBakey was just getting started, but certainly he became a very, very prominent surgeon.
137 Q. DeBakey is still alive, isn't he?
A. I, actually, don't know.
138 Q. Well, just a few years ago he treated Boris Yeltsin, the Russian prime minister, and DeBakey had to be about 95 when he did it. Do you remember that?
A. No.
139 Q. Certainly a famous, world-famous man, Michael DeBakey?
A. At this time he was not.
140 Q. Right. But he went on, and as I said in the flower of his career he was a world-famous man, as was Alton Oschner,

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who founded the Oschner Clinic in New Orleans.
A. Right.
141 Q. Okay. So these guys, Oschner and DeBakey, write this article in 1941.
A. Right.
142 Q. And it is published in Archives of Surgery. That was a pretty good journal, right?
A. Yeah.
143 Q. And they go through a -- really, a long, fairly detailed analysis of the problem of lung cancer, do they not?
A. Yes.
144 Q. And, in fact, one of the things they discuss is that lung cancer's on the rise. Right?
A. Yes.
145 Q. And that, really, if it were something that was only connected to the heredity, if it was something that was only based in the person, that because human heredity hasn't changed in the last, I don't know, hundred million years or whatever, it doesn't change much, that this must have been something new coming into these people's bodies that was causing this disease. Fair?
A. That's what they were saying. There were certainly other interpretations of what was going on, but that's what Oschner and DeBakey were saying.
146 Q. I'm going to ask you in detail about those other ones. I

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mean, not to be here all day, but I'm going to ask you about that. Wasn't this the argument: Now, look guys, since the human being -- the genetic makeup of the human being has been stable for how long? Hundred thousand years, at least?

A. Yeah. I'm not an expert in that. Right.

147 Q. Since we were, whatever, right? But a long time? Been stable since the first part of the --

A. Not to anticipate some of his other arguments that people made, that there had been a shift in the cause of death, in sort of broad terms. So 50 years ago lots of people were dying of, you know, infectious diseases. So you had people living longer, in general, in a sense, having the opportunity -- and it's sort of a twisted way to put it, but an opportunity nevertheless -- to get things like lung cancer.

148 Q. Of course.

A. That doesn't require a change in genetics.

149 Q. Does not. That is one of the alternative explanations. I'm going to go down the line and, like, collect all these alternatives, okay?

A. Okay.

150 Q. We're going to see how long they stood up to scientific analysis. Are you prepared to do that?

A. Yeah. It's going to be a long day, but sure.

151 Q. I'm going to try and move it along. But you did quite a bit in direct, so if you'll forgive me.

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A. All right.
Q. All right. So what Oschner and DeBakey did was, they were one of the first ones to identify what they call parallelism, right?
A. Yeah.
Q. And that parallelism is the apparent connection, or, I should say, not connection, but just like two railroad tracks running in parallel, that when you have the -- over here you have the lung cancer per hundred thousand, that's this line down here, and the tobacco production is this line up here.
A. Yeah. What page are we on here?
Q. Page 221. And then just to confuse things, they also put the automobile production on here, which is this dotted line which goes loop, loop?
A. I don't know if that's a correct characterization to say "to confuse things."
Q. I was just being facetious. I'm sorry. I was using -- just being colorful. That's all.
A. Okay.
Q. Okay. So that was the basis of Oschner and DeBakey, really, wasn't it?
A. Yeah.
Q. Because they did not go out and count how many people who smoked got cancer versus how many people who didn't smoke got cancer?

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A. Right.
158 Q. That was coming later?
A. Right. At some point in this discussion of Oschner and DeBakey I would like to read from the biography of Oschner, the discussion of this early research.
159 Q. Well, I'm really happy to have you go and read from the biography and everything, if you want. But, really, we don't want to be here forever.
A. This is short. It says, "By strict scientific standards, they went off half-cocked." This is generally a sympathetic biography, and I think it's fair to say that's how lots of Oschner's colleagues received his work, including Graham, as I talked about yesterday.
160 Q. Absolutely. You're in battle mode here. You're debating Oschner and DeBakey here with me, aren't you?
A. No, no. I'm telling you -- and that's not what I'm doing. I specifically want to avoid that today. I am not saying -- I am not saying that they were wrong. I'm telling you that many of their contemporaries perceived problems with their research.
161 Q. I never asserted that they didn't. Let's go a step at a time.
A. All right. All right.
162 Q. All right. Because this was just the beginning, wasn't it? Oschner and DeBakey was parallelism and an idea. An

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idea. And they didn't even say, "This is a statistical study or an epidemiologic study." All they said was, "It is our definite conviction that the increase in the incidence of pulmonary carcinoma," which is cancer, "is due largely to the increase in smoking, particularly cigarette smoking." They did say that?

A. Correct. It was their conviction.

163 Q. Conviction. That's all it was at that point. Right?

A. Correct.

164 Q. And their conviction that they had observed this parallelism -- they were clinicians. They dealt with people who had lung cancer. They looked at this and they said, "You know, I think it's due to smoking."

A. Uh-huh. Right.

165 Q. And, in fact, they also -- they didn't just pull this out of the air, because they did go through an analysis here of whether it was -- some people had said it was tarring of the roads. Remember that?

A. Uh-huh.

166 Q. The British had been putting tar down, you know, and they thought, "Well, God you're breathing this tar, maybe that's what's doing it." But they pretty much went through here and they said, "No, that's not kind of what -- it's not looking like tarring of the road," right?

A. Right. Richard Doll, another one of the scientists that

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I assume we'll get to at some point, there's an interview I have of him where he says that was his best guess.

167 Q. I'll get to Richard Doll. Trust me.

Oschner and DeBakey, they go through and they say, "Well, we don't think it is tarring of the roads. We don't think there's been a change in the human genome." They might not have used that word. "The human heredity didn't change, yet we're starting to see this climb. And the reason that we think it is is because it's cigarettes. But, God, we can't prove it." Right?

A. Right.

168 Q. Okay. Now, about this time there was a man in the American Tobacco Company -- and the American Tobacco Company in 1941 was based where?

A. In New York City.

169 Q. Okay. And who is in charge of their research back then?

A. Well, their research was in Richmond, Virginia, their research lab, and that was Hiram Hanmer.

170 Q. He was there way back then, right?

A. Yes. He started with the company in 1921, I think it was.

171 Q. Okay. And Hiram Hanmer -- an unusual name -- he was a chemist, I thought, wasn't he?

A. Yes.

172 Q. Not a biologist at all?

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A. Correct.
173 Q. No training in statistics or epidemiology?
A. Correct.
174 Q. Okay. Now, Hiram Hanmer, did he see the Oschner and DeBakey piece?
A. I am not certain.
175 Q. Well, he certainly had it available to him, right?
A. Well, it was out there in the medical literature. I'm not sure he was reading Archives of Surgery.
176 Q. Well, you do agree, don't you, that if you are a manufacturer of a product, that you are treated as an expert in that product, and you need to keep up with what's published?
A. I suppose that's reasonable, yeah.
177 Q. So he certainly had access -- Archives of Surgery was published all over the country, right?
A. Yeah. Well, it was published in one place and distributed all over the country, I guess.
178 Q. Well, thank you. Today we can publish things at our desk, right? But back then it was published and then it was distributed?
A. Right.
179 Q. Do you know whether they got a copy of this?
A. I don't.
180 Q. Well, anyway, back in 1941, ESH, from the American

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Tobacco Company, was who?
A. Harlow. Edward Harlow, I suppose.
181 Q. Harlow? Who was he?
A. He was another researcher. He was a subordinate of Hiram Hanmer's and also a chemist, I believe.
182 Q. Another chemist, okay. Now, in 1941, had the American Tobacco Company observed the parallelism, the parallel rise of cigarette consumption and lung cancer?
A. I'm not sure if they were thinking of it in those terms.
183 Q. Had they proven that Oschner and DeBakey were wrong?
A. No.
184 Q. Okay. So you have seen the document, an internal document coming from ESH, Mr. Harlow, inside American Tobacco, dated the 3rd of February, 1941, have you not?
A. I'm not sure. Do you want to show it to me?
185 Q. I'll put it on the screen.
A. Oh, yes, I have seen that.
186 Q. It is called, "The Importance of Biological Research"?
A. Yes.
187 Q. Just to make sure we're all understanding each other, this document you saw where?
A. On the website.
188 Q. All right. It was a private document in its day, right?
A. That's my understanding.
189 Q. It was not sent to the public?

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A. Correct.
190 Q. It was a memorandum kept by this ESH, Harlow, inside American Tobacco? Right?
A. Right. Do you mind if I pause here and dig it out of my pile?
191 Q. Please do.
A. Bear with me.
192 Q. This is Exhibit 19 in evidence, for the record.
A. That's not going to help me, but --
193 Q. I wasn't directing it to you.
THE COURT: He was talking to me.
MR. WILNER: I have to also direct it to the court reporter.
THE WITNESS: No problem. This is my debut, after all.
BY MR. WILNER:
194 Q. All right. I'm with you.
A. Okay.
195 Q. You've seen this document?
A. Yes.
196 Q. Well, perhaps, you can assist us in understanding what it means.
A. Well --
197 Q. Let me start. I'll read you something.
A. Sure. Okay.

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198 Q. It says, "The Importance of Biological Research. It may be assumed that the medical profession is the group which it is most desired to reach and convince." Did I read that right?
A. Yeah.
199 Q. Convince of what?
A. Convince -- I'm not sure.
200 Q. You're not sure?
A. Let me just read on here. I haven't looked at this in a couple of weeks. I think it is saying convinced that there is not a straightforward case for smoking causing lung cancer.
201 Q. Convinced there's not a straightforward case? Where does it say that?
A. Well, that's my interpretation. It doesn't say it explicitly. You asked me to try to explain what it means, and that's my stab at it.
202 Q. "We venture the opinion that they are less skeptical than other scientific groups and are easier to convince if properly approached; however, they're jealous of their prestige and fearful of exploitation, therefore, difficult to reach."
Now, the issue of -- now, you said for convincing, that you think the American Tobacco Company in 1941 wanted to convince the medical profession that the case against cigarette smoking was not straightforward. Is that what you said?

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A. That's what I said, yeah.
203 Q. Well, how would the American Tobacco Company know at that point?
A. Well, for one thing, they had worked with Egon Lorenz from the National Cancer Institute, and that research had been negative, that we talked about, or, at least, briefly yesterday.
204 Q. What was that? Mice?
A. Uh-huh.
205 Q. Mice smoking?
A. Yeah.
206 Q. Now, wait a minute.
A. I mean, that's biological research. That's what they're talking about here.
207 Q. So they put some mice -- with Egon, in 1940, they put some mice in a chamber, they emitted smoke to them. Was this ever published, incidentally?
A. Yeah, it was an abstract.
208 Q. Just an abstract. They put some smoke in them and they didn't get lung cancer?
A. Correct.
209 Q. Big deal, right?
A. The people involved thought it was a big deal.
210 Q. The people involved where?
A. At the National Cancer Institute.

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211 Q. The people at American Tobacco?
A. I don't have specific records of their reactions. I think they were certainly aware of the results. They were treated as --
212 Q. How long does it take a human to get cancer of the lung?
A. I mean, again, I am not an epidemiologist.
213 Q. Twenty years?
A. I've read that figure.
214 Q. How long does a mouse live?
A. I'm not a mouse expert, either. But, you know, a year or so, I think.
215 Q. A year? Okay. How do you get cancer in a mouse in the lung? How can you possibly do it?
A. I'm not an expert on that topic.
216 Q. So the fact is, how do you get a mouse to smoke a cigarette?
A. Really small ones. I'm just joking.
217 Q. Well, in fact, mice and other rodents who live close to the ground, as a matter of fact, have what they call an extensive array of nasal turbinates, which are filters in their nose, because if your nose spends most of its life an inch or less from the ground, you've got a lot of junk to filter out. Do you know that?
A. I didn't, but I do know that that -- that my historical opinion is that that analysis, which you're giving of the

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problems with this mouse inhalation study, is something that was not part of the discussion at the time.

218 Q. They didn't know that mice had nasal turbinates and they needed to filter out the dirt?

A. I mean, I don't know if they knew it, but it wasn't -- I mean, that, I think, is one of these cases of bringing knowledge and interpretations more of the present or of later years and sort of imposing them back on the past, which is this fundamental thing that historians don't want to do.

219 Q. So if you start gassing the mice in their cage, they filter out so much of the smoke, you've got to put so much gas in there that they basically die before you can do anything to them?

A. Right. But what I'm telling you is Egon Lorenz and Harold Stewart were world renown experts, they were pathologists, you know, and at the time they thought these negative results were highly significant. And, you know, that was an important finding in history. You can argue with it now retrospectively, but at the time it was significant.

220 Q. Okay. Let me go back to this thing. Why did the American Tobacco Company want to convince the medical profession?

A. I'm not sure. Another point -- I mean, this isn't the American Tobacco Company talking here. This is Edward Harlow talking. So, I mean, we're talking about individuals within

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the large organization. Again, as a historian, I like to focus on people rather than, you know, treating organizations made up of a bunch of people as sort of the monolithic uniformed beings.

221 Q. Who is this guy Harlow? You knew all about him, right?
A. We already talked about that.
222 Q. Who was he? I forgot.
A. A chemist, a researcher at American Tobacco Company.
223 Q. Okay.
A. This is one memo that one staff member at American Tobacco is writing, and so it's not like an official policy statement, I don't think, of American Tobacco Company.
224 Q. All right. Oh, yeah. Have you got a statement then from the company that says, "Mr. Harlow's wrong. We don't really want to convince the medical profession. This was just his thing and it's not our thing." Have you got that?
A. No. But -- no, I don't.
225 Q. All right. So I'm back to my question. Why would they want to convince the medical profession of anything? Why?
A. They doubted the link between smoking and lung cancer, and they had lots of company in that regard.
226 Q. They what?
A. They had lots of company in the scientific community.
227 Q. So what? Let the medical people make up their mind. Why do they want to convince them?

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A. I'm not sure.
228 Q. Is there something called financial interest that could be at stake here?
A. Perhaps.
229 Q. So if they thought they could convince the medical establishment or the medical doctors -- what do they call them here -- the medical profession that it wasn't true, what might be coming out maybe by Oschner, and much more later, then those people, those medical professionals would not be telling their patients to stop smoking. Isn't that logical?
A. There's a logic there, sure.
230 Q. And the logic is that when they don't tell their patients to stop smoking, they smoke more and they buy more American Tobacco products. Do you deny that?
A. I don't deny that, but I don't -- I think there was a level of -- there wasn't this level of bad faith that you're suggesting. I think that the scientists at American Tobacco genuinely doubted the link, and my testimony is that there was plenty of doubt within the scientific community to support that position.
231 Q. My question was not whether they genuinely doubted it, but why they wanted to convince the doctors. That was what my question was.
A. Okay.
232 Q. And that's for financial gain, isn't it?

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A. I don't know.
233 Q. You mean, you just stopped -- you've looked at these documents, you interpret things. You've given us opinions about what was in people's minds about, in the Surgeon General report, about how some Surgeon General made a draft and he was really thinking something else, and now when it comes to American Tobacco, the very company we're here about, you stop. "I can't draw that conclusion," you say. Why not?
A. Well, if you want me to acknowledge that the American Tobacco Company was a for-profit corporation, sure.
234 Q. Oh, so now convincing the medical profession so that they don't tell people to stop smoking, that's okay if you're a for-profit corporation. That's perfectly all right. You make profit, and if you do it by going to doctors and saying, "Doctor, it's not true, don't tell your people to stop smoking," that's okay with you?
A. I'm telling you, American Tobacco was a for-profit corporation, yes. I'm also telling you that this is -- there's doubt within the company and there's doubt within the scientific community. That's my testimony.
235 Q. Let's go to page 2. Oh, by the way, did American Tobacco ever ask you what you thought about that, that I just read, whether you thought it was okay to ask the medical profession to stop telling people to quit smoking?
A. No.

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236 Q. They avoided that, didn't they?
A. I've never even explicitly discussed this document with them.
237 Q. Oh. Why not? It seems to be pretty important about laying the foundation here, doesn't it?
A. Just never have.
238 Q. Okay. Well, let's go to page 2. So you said the American Tobacco, oh, they were convinced, they did a mouse inhalation study, and even though you couldn't get enough smoke into the lungs of the mice, they didn't know that then, so they wanted to go out and tell all the doctors. So let's go to page 2 and see if that's right.
MR. SHEFFLER: Your Honor, I object to the preamble.
MR. WILNER: I'll withdraw it. Just trying to make sense.
BY MR. WILNER:
239 Q. Here's page 2: "The tobacco industry is very much in need of some friendly research in this field." Do you see that?
A. Yes, I do.
240 Q. What is "friendly research"?
A. I'm not sure. Research that they were going to sponsor. It's a little unclear.
241 Q. What do you expect from your friends, Doctor? Let's start there. You expect your friends are not going to hurt

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you, right?
A. Sure.
242 Q. They're going to say good things about you, right?
A. Sure.
243 Q. So if you want friendly research, then you want to go and set up some people, who are your friends, who are going to give you back in their research what helps you. Isn't that obvious?
A. Okay.
244 Q. Well, that is -- that is a sick way to do research, isn't it?
A. That's a little harsh, but -- and, again, this is one assistant within the research department offering up his suggestion.
245 Q. Doctor, would you answer my question about whether it is sick?
A. No, I don't think it's sick.
246 Q. It's not? You said it was harsh. Is it harsh for me to say that?
A. I think that is a harsh interpretation.
247 Q. How many people -- how many people were killed by cigarette smoke --
A. I don't know.
248 Q. -- in the years 1941 until 1969?
A. I don't know.

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249 Q. You don't have a clue?
A. No.
250 Q. So when you say I'm being harsh, you don't take that into account, how many deaths we're talking about?
A. No.
251 Q. You think that friendly research in cancer, which would bring back to the company that sponsored it a friendly opinion, which could then be used to go to the public and say, "It is not true," and go to the doctors and get them to not counsel their patients to stop smoking, with the effect that people would die, is that harsh?
MR. SHEFFLER: Your Honor, I object. I think this is argumentative.
THE COURT: Well, it is, but it's cross-examination, so I'll let you ask him.
BY MR. WILNER:
252 Q. Is that harsh?
A. Well, I think we need to understand that Harlow and Hanmer, to whom he was writing, genuinely believed at this time that there was not a link, a causal link between smoking and lung cancer. I mean, you can look back on it and think those guys were wrong, they were dead wrong. But as a historian, I am prepared to sympathize with them to the extent of granting the possibility, not the probability, that they genuinely believed that smoking did not cause lung cancer. So

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to impute on them, if they genuinely believe that, all of these subsequent deaths from smoking and lung cancer seems unfair.

253 Q. Well, let me ask you this. If it seems unfair, if they genuinely believed it, why did they have to have research that was friendly?

A. I think another way to interpret this friendly research is that, you know, they were confident that if they did -- if they sponsored some research, that the results would be negative, that they wouldn't have to fudge the results, that that's how it would turn out, that the results would be negative.

254 Q. Well, why do you have to go to your friends?

A. Well, I mean, I think -- you're interpreting "friendly" in the most negative possible way. And I think there are other interpretations, one of which I've just suggested.

255 Q. There are lots of other interpretations, Doctor. Perhaps I'll agree with you that anything is subject to other interpretations. Let me go on to say what they did do. Didn't they create in the Medical College of Virginia a bunch of their friends?

A. They sponsored research there.

256 Q. Well, they sponsored -- they did more than sponsor research. They actually put this guy Larson, who was at that time sort of -- they considered actually taking him on to

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their own staff. They said, "Dr. Larson seems equipped for this position. I feel we should not take him into our staff directly, and I asked Dr. Haag, who was at the medical college, if an arrangement would be made whereby the medical college might secure his services on the basis of a grant." Do you see that, page 4?

A. I just found it, so let me get my bearings. Yeah.

257 Q. So they set him up? They set him up, didn't they?

A. Yeah. I mean -- again, sure.

258 Q. And look at the -- and the paragraph on page 4, "In the meantime" -- while they're setting him up as their man in Virginia, he's our man in Virginia. "In the meantime he can do a number of things that we feel should be done to refute the reckless statements which have been made almost daily at the expense of the tobacco companies -- tobacco industry." Does he say that?

A. Yes.

259 Q. So not only was this research supposed to be friendly, it was supposed to be refuting statements on behalf of the financial interest of the tobacco industry. True or not?

A. Again, this goes back to my previous interpretation, I think, that Harlow genuinely believed that there wasn't a causal link between smoking and lung cancer, and that they were concerned about these statements in the press, other places, that they genuinely perceived as reckless and untrue,

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and they wanted to do research that they were confident would, if done properly, refute the claims of people like DeBakey and --

260 Q. DeBakey?

A. DeBakey -- I'm sorry -- and Oschner, that they perceived as genuinely reckless. I read from this biography, "They went off half-cocked." I mean, there are others at the time who thought that. I mean, Graham was Oschner's teacher, and he thought he was going off half-cocked.

261 Q. We're arguing now. Let's stick to the point.

A. All right.

262 Q. All right. Your view, regardless of you pulling off something to say half-cocked, your view of carcinoma of the lung by --

A. You're saying I'm half-cocked?

263 Q. No, no. I said you pulled off something from the Alton Oschner bio that said half-cocked. I understand what you said.

A. I'm also pointing to the Graham --

264 Q. Please don't interrupt. And I wasn't being disrespectful. I'm not being disrespectful. Sir, I'm challenging your ideas and not you personally.

A. Fair enough.

265 Q. Are you contending that the article which appeared in Archives of Surgery by Oschner and DeBakey is reckless?

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A. I'm saying that -- I mean, no, absolutely not. I am not saying that. What I'm telling you is that Harlow perceived that kind of thing as reckless, and that's a crucial distinction.

266 Q. I thought you said you didn't even know if American Tobacco read it.

A. I'm saying, there are other things in the newspapers and in the literature. At this point, things are just getting started, suggesting a link between smoking and lung cancer.

267 Q. And that's reckless? Reckless?

A. That's the word he used, you know, in a private document.

268 Q. Incidentally, on the issue of recklessness, did you ever get a chance to look at the number of research sources that were cited by these doctors, by Oschner and DeBakey, when they did this article in 1941? Have you ever looked at it?

A. Have I looked at the bibliography?

269 Q. Oh, yeah.

A. Yes.

270 Q. It is like 400 sources. There are sources in foreign languages. They didn't use any copy machines, probably, right?

A. Right.

271 Q. This was all something they had to do in the library. They had to translate from foreign languages. Do you see the amount of work that it would have taken? That's just the As.

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I'm on page 1. There are the Bs. Look at all these -- these are all references in tobacco. On page 3 of the references, I'm still on the Cs. What a research project this was.

A. Right.

272 Q. This was reckless and half-cocked?

A. Right. Lots of these citations are about the techniques of doing bronchiogenic surgery, removing the lung. So this is not just an article about the cause of lung cancer. I mean, this is in a journal about surgery, and it is largely an article about surgical technique.

273 Q. That's not reckless, is it?

A. No.

274 Q. Now, Oschner and DeBakey -- so we can sum up this -- they were based in parallelism. Parallelism. And they didn't do what we would call an epidemiologic study, right?

A. Correct.

275 Q. Okay. But that was not long to come, was it?

A. Well, I mean, a decade or so.

276 Q. Well, the war, the war in Europe, which you're familiar with --

A. Yes.

277 Q. -- that was upon us in 1941, right?

A. Right. Right.

278 Q. And so arriving after 1941, or, rather, what I meant to say, after the war was over and things got back to normal,

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people began, again, to study the issue of smoking and disease, did they not?
A. Yes.
279 Q. And one of them was a brash, obnoxious German Jew, pushy, called Ernst Wynder.
A. Yes.
280 Q. And he rubbed the medical establishment a little bit the wrong way, didn't he?
A. Yes.
281 Q. I mean, here's a kid, still in medical school. Let's think about this. You've got the National Cancer Institute, who is charged with finding out why people are dying of cancer. True?
A. True.
282 Q. You've got the American Cancer Society, which is the biggest private organization with public funds, probably. I don't know whether it did back then, but a big organization, has the same charge, right?
A. Correct.
283 Q. Here comes a medical student who basically says to both of them, "The biggest cancer causing agent in this country, in the world, is right under your noses, and you guys don't even get it."
A. In a sense, yes.
284 Q. Now, what do you think they did?

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A. Are you talking about the meeting in Memphis?
285 Q. I'll go a step at a time. We'll talk about the meeting in Memphis. But just in general, this was a hell of a thing to swallow, wasn't it? If this kid was right, these guys had been asleep at the switch.
A. I mean, that's one way to put it, sure.
286 Q. All right. Now, Wynder was right, we know now, right?
A. Yes. Looking back.
287 Q. He's a hero? A hero?
A. Sure. It's kind of -- not a professional historian's way of looking at the past, but all right.
288 Q. If it worked for Wynder to kick these guys and get them going, then who knows how long it would be --
A. I am kind of curious. You just got done telling me that things were all settled in 1941 with the Oschner article, everybody should have known about it, and now we're moving to Wynder --
289 Q. Are you debating me?
A. This is my debut, sir. If I'm not supposed to do that, I won't.
290 Q. Let me put your mind at ease. I'm going to let you testify to anything you want to, okay, within the limits of time.
A. All right.
291 Q. But in order to get out of here, I'm going to try and ask

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you the questions.
A. Okay.
292 Q. Okay? And since you challenge me, I'm going to have to respond. You said I said everybody knew. I am not making the contention that Oschner and DeBakey was the end.
A. Okay.
293 Q. Because on the horizon was the good Dr. Wynder, right?
A. Well, he wasn't a doctor yet at this point, but --
294 Q. Quibbling?
A. Well, fair enough.
295 Q. So, what I want to do is try to understand how this came about. So Wynder has the idea, pushy Wynder, that the way you find out whether people are dying of cancer from cigarette smoke is you don't stick mice in the drawer, but you go out, basically, and you start finding out, you collect all the cases of lung cancer that you can in the whole -- everywhere you go. You go to the doctors and you say, "Give me your case files. I want to look and see who got the lung cancer. And then I'm going to find out whether they smoked. And I'm going to write that down. When I'm done, I'm going to compile all this information. And by God, if the smokers are getting the cancer, that should show up." Right?
A. That was essentially what Wynder was doing.
296 Q. It's not a bad idea, is it?
A. Right.

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297 Q. Well, now, here's my 64-dollar question to you: Hanmer, sitting in the American Tobacco Company, trying to convince the doctors that it's not true, why wasn't he doing this?
A. Well, for starters, he was a chemist.
298 Q. You mean he just couldn't figure it out?
A. I don't know for sure, but, I mean, I don't have direct evidence as to why he didn't do it, but he didn't do it.
299 Q. Well, why didn't he -- why didn't he hire somebody to do it?
A. I don't know.
300 Q. It was pretty important, wasn't it?
A. Looks so in retrospect. I think he was convinced that there was just nothing to it.
301 Q. So convinced he didn't bother to look?
A. Yeah, in a sense.
302 Q. And that's good. You looked at this from an ethical point of view, "I'm just so convinced, I'm not even going to bother to look at it"?
A. No, I didn't look at it from an ethical point of view. I looked at it from a historical point of view, and that's my reading of the historical reality.
303 Q. Well, put on your ethical glasses for a minute, Doctor. Is that the way people are supposed to behave?
MR. SHEFFLER: Your Honor, I'd like to approach for a minute, please.

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THE COURT: All right.

(Bench conference reported as follows:)

MR. SHEFFLER: Your Honor, I have not objected much, but I think all this talk about ethics, et cetera, is confusing. And you're going to tell the jury what the duty and law is. Ethics is not what we're trying in this case, and I think it is unfair, especially since he said he's not an ethicist to begin with.

THE COURT: I agree with him, Mr. Wilner. Go ahead.

MR. WILNER: Only to say his direct testimony exonerated American Tobacco, he was very clear about that, because he's just testified again here, he said those were honorable people, they were good people. I heard that exactly. And he said that in his direct testimony. So only to impeach that question, I think that's fair. He's definitely laying the impression that this is fine, and I'm -- he's going beyond his original charge when he does that, but he did that.

THE COURT: We're not trying the morality of this. And that's really --

MR. WILNER: Okay. I understand the Court's ruling. And I'll do my best. Thank you.

(Whereupon proceedings continued in open court as follows:)

THE COURT: This is probably a good time to take a

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break. We'll be in recess for 15, 20 minutes. Don't discuss the case.

(Recess at 10:20 a.m.)

C E R T I F I C A T E

I, Eugenie M. Power, Official Court Reporter, do hereby certify that the foregoing is a true and correct transcript of proceedings in the above-entitled case.

_____ Date: May 16, 2003
Eugenie M. Power, RMR, CRR, CCR
United States Court Reporter

(Continuing at 10:35 a.m., jury present.)

THE COURT: Mr. Wilner?

MR. WILNER: If it please the Court.

BY MR. WILNER:

Q. Mr. Harkness, before we broke, we were just talking about how the heroic Wynder as a medical student traveled the country --

A. Yes.

Q. -- with the astonishingly simple idea that he would compile a comparison of the people who got cancer and the people who didn't with respect to whether they smoked or not.

A. Yes.

Q. Right?

A. Yes.

Q. And you told me you didn't know why Mr. Hanmer or the American Tobacco Company hadn't thought of that; right?

A. Right.

Q. So, in fact, you produced or you found a series of correspondence between Wynder and Evarts Graham.

A. Yes.

Q. Do you remember who that was?

A. Absolutely.

Q. Evarts Graham, the grand old man, the surgeon, the teacher of Alton Ochsner; right?

A. Yes.

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Q. Who -- Wynder approached and got Graham interested; right?
A. Right.
Q. Now, Graham at first, he was pooh-poohing this. He wasn't buying this, he didn't really understand it. Right?
A. Right.
Q. And he -- then Wynder came to him and said, listen, this is important stuff. I want to do it. And Graham really became his patron.
A. Yes.
Q. Now, to give the idea of what Wynder was going through at the time, defense -- or rather, in evidence 02805, here is Wynder's letter of July 10, 1949. And Wynder is out on the road. He is looking at all the lung cancer cases he can get his hands on. He's got no money. He says, "I have all of my own money." And, "...besides wanting to send you my best regards, is a request for money, that since I have all of my own money in St. Louis and since I do not want to borrow money from my family, I have to rely on our fund." Evidently he had some little fund. "I think that $150 would help to see me through."
$150. That's what he wanted.
A. Yeah.
Q. So he was -- he was a crusader, wasn't he?
A. That's one way to put it, sure.
Q. I mean, he wasn't making any money, was he?

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A. No.
Q. Okay. So he goes throughout the country, and here on July 16 -- this is the summer of 1949?
A. Yes, okay.
Q. So here he says he's been -- he's been at Memorial, Sloan-Kettering, he's been around, he's seen different doctors, all these different doctors. I won't go into it for time. He has also talked to -- he's having trouble with trying to get money out of the American Cancer Society.
A. Uh-huh.
Q. And he says -- and, in fact, he's a little -- he's ahead of even the study, the one that we're going to talk about, the 1950 study, the epidemiologic study, he's even ahead of that, because he's saying in 1949, "In my own mind I feel we must now begin to work on a specific carcinogenic substance present in tobacco."

So in his brain, as advanced as he was, he was already thinking of how he would find the carcinogen or carcinogens in the product. Something he didn't do or something that he didn't test for until four years later in the mouse painting experiment, where he tried to establish the presence of carcinogens in the product; true?
A. Well, he started that mouse skin painting work, I mean, not four years later. That's when he reported on it.
Q. Right.

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A. Yeah.
Q. Okay. But he had the idea back in terms of -- back as far as 1949?
A. Yeah. He actually had the idea a little earlier. If you want me to dig it out, there's another piece of correspondence, or I think it's a paper he wrote as a medical student, if you want to get into that, but I don't --
Q. No. It's in agreement. It's fine.
So here on August 27, 1949, very interesting. He is out in -- he says, "This evening I am leaving for San Francisco. The data I have obtained so far reaffirm our previous results completely. You may recall I declared in my usual enthusiasm that if a Mormon develops bronchogenic carcinoma, he smokes."
That's quite a bold statement, isn't it?
A. Yeah. He was quite a guy.
Q. "I am glad to report that this statement has now been backed up by" -- what?
A. "Facts."
Q. "Facts." And isn't that what Dr. Wynder was doing here? I mean, this wasn't just an opinion piece; he was out getting the facts. Fair?
A. Sure.
Q. So then he says -- he's been to Salt Lake City. "We interviewed about 700 patients. "The Mormons" -- the Church of the Latter Day Saints. He calls it by the popular name. The

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Mormons he was interested in because they had a policy of no drinking and no smoking; right?
A. Right.
Q. But he says if they show up with lung cancer, they're smoking, whether they're admitting it or not; right?
A. That's what he is saying.
Q. And he proved that; right? Well, at least according to him.
A. Yeah. That's his --
Q. He says, "As I've stated many times before, I feel that we have the answer" -- this is page 2.
A. All right. I have to dig this out. I'm not sure I'm on the right page on the screen.
Q. No, I'm not asking you anything real controversial here.
A. That's fine. I'll follow along.
Q. I wanted to make the point, "As I have stated many times before, I feel that we have the answer to explain the study and continued increase in the incidence of bronchogenic carcinoma." That's that parallelism; right?
"I believe that one of my earlier statements that squamous or undifferentiated cancers of the lung in a male are very rare in non or minimal smokers has now been proved time and time again, particularly since the same holds true for the Mormons" -- I will put it up because it was longer than I thought.

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A. Okay.
Q. -- "Mormons, among whom you find more non and minimal smokers than among the remainder of the American population, even though, as stated before, they smoke more than the Church believes they do."
So here he is out here looking at a special population and finding that his ideas are being verified.
A. Yeah.
Q. And, in fact, he later -- and just to jump ahead, we'll get to this study, the one he was putting together now, but he also studied physicians and their smoking habits and published a paper, an excellent paper showing that it was only the physicians who smoked, virtually only, who got lung cancer, and the nonsmoking physicians didn't get it. True?
A. Yeah.
MR. SHEFFLER: Your Honor, I didn't catch the number for that exhibit. Can we get the number?
MR. WILNER: Sure. I'll get it.
MR. SHEFFLER: I'm not objecting to it.
MR. WILNER: It's in evidence.
THE COURT: 02805, I think.
MR. WILNER: 2810 is what I --
THE COURT: 10. I'm sorry.
MR. SHEFFLER: Thank you.
MR. WILNER: 2810.

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BY MR. WILNER:
Q. 2811 in evidence. September 3, he is still out. He is collecting data. And I wonder if you recall this letter.
A. Well, I mean, I've read all of them. Whether I --
Q. All right. Well, I'm going to direct your attention.
A. Sure. What's the date of it?
Q. September 3, 1949.
A. Okay. So he's just finishing his trip then.
Q. Yeah. He's going, he says, "Just a note before leaving for Los Angeles tomorrow evening."
A. Okay. Yeah.
Q. "I have been able to see quite a few cases during my stay here in San Francisco," says that the doctors have treated me well, and I'm past the 100 mark.
"The results are as convincing as before. I have also come across two more epidermoid cancers in women." And he says, "The smoking here at the coast among the lung cancer cases is as heavy as I found it in New York."
So evidently there wasn't much of a difference between people in San Francisco who smoked and they got lung cancer; people in New York who smoked, they got it too. Right?
A. That's what he was finding.
Q. The reason I pulled it out was this paragraph here.
A. Okay.
Q. I'll go ahead and read it, just because it's easier for me

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to do it.

"I found another interesting case concerning latency period. The patient began to smoke at 14 and for the most part of his life averaged two packs a day. When he was 54, he stopped smoking because of coughing spells. 13 years later he comes down with a squamous cell cancer." And he says he was Brodie Stephens' case. "Both the intern and the resident had noted down in the chart that the patient does not smoke. This case not only shows again the importance of detailed history taking, but gives again evidence of long latency periods of tumor induction. You may recall that I have seen three previous cases that had apparent latency periods of ten years."

So here he is finding a case that is really just like Ms. Boerner's case, isn't it?

MR. SHEFFLER: Objection, your Honor. It's not like Ms. Boerner's case. The cancer is different. It's a male instead of a female. I object.

THE COURT: Okay. He can answer it, if he can. I don't know if he's qualified to answer that question.

THE WITNESS: I'm afraid I'm not.

BY MR. WILNER:

Q. Okay. You didn't hear anything about what brought us here in this courtroom in terms of the disease of Ms. Boerner?

A. I haven't.

Q. Or about how long her latency period was?

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A. No.
Q. How long it was between the time she quit smoking and the time she got the disease?
A. I know nothing about that.
Q. Okay. Fine. But, nevertheless, you'll agree that back as far as 1949, Wynder was observing people who smoked, quit, and got dead by it, got killed by it over a decade later, and writing it, at least in his papers; right?
A. Right, and in a private letter here.
Q. Private letter. Okay.
A. Uh-huh.
Q. So are you saying that Mr. Hanmer did not have access to this?
A. To this letter?
Q. Well, let's -- a step at a time. He didn't, did he?
A. Right.
Q. But he sure had access to the cases, didn't he? If he wanted to go out there and do what Wynder had done, he would have found these cases.
A. That's a big if, but sure. Okay.
Q. Well, it's a big if because he decided not to do it; right?
A. Right.
Q. Okay. So there was no mystery about latency in terms of, it was there for the scientists to discover and to tell people

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about; true? It existed. It was a fact in the natural world.
A. Looking back on it, yes, but this doesn't mean that, I mean, just because Ernst Wynder is bringing it forth, you know, in this letter in 1949, that there was consensus that he had a point. I mean, it was --
Q. It doesn't mean that, but it doesn't mean there wasn't; right?
A. Doesn't mean there wasn't what?
Q. Doesn't mean the opposite either. It means that Ernst Wynder observed this case and wrote about it in a letter.
A. Yes, I'll --
Q. And that case was there as -- and you're not going to suggest for a minute that that's the only time that ever happened, are you?
A. That there was a latency period?
Q. Yeah.
A. No.
Q. So anybody who had gone out there, you know, and said, by golly, let's see what's really happening in the world, let's go out and see who is getting sick, they would have found this stuff, wouldn't they?
A. If they approached it the way Wynder did, yeah.
Q. Including the latency period?
A. I suppose.
Q. Okay. So Wynder continues on his trip, and I don't want

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to belabor it, but he ends up where he ends up November 10, '49. Here's Graham. This is interesting, isn't it? This is Graham, who has been receiving the information from Wynder; right?

A. Uh-huh.

Q. Now, Graham is a well-respected guy; right?

A. Absolutely.

THE COURT: What is the exhibit number on this one?

MR. WILNER: I'm sorry, your Honor. 2772.

THE COURT: Thank you.

BY MR. WILNER:

Q. Now, Graham writes his friend, Leonard Scheele, who was the Surgeon General.

A. Yes.

Q. These guys were writing each other; right? They were close.

A. Right. They knew each other and respected each other.

Q. Sure. In fact, he says that he was glad -- that, you know, "I intended to write you a letter congratulating you on becoming the Surgeon General." So he probably knew him before; right?

A. Right.

Q. And he says the results -- he's talking about, "The question of cancer of the lung which you mentioned in your letter I will say we are actively engaged in a statistical

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study from the standpoint of the association of cigarette smoking with this disease. This work has been carried out with the assistance of the American Cancer Society and the results have been very striking."

So Graham certainly believed that at the time, didn't he?

A. Yes.

Q. Now, let's go ahead just for a moment to the actual publication. And I'll show a slide of it first. I have the -- you have it in your materials, don't you?

A. Yeah. Are we going to talk about it in detail? Should I dig it out?

Q. Yeah. You can dig it out. I never want to tell anybody --

A. I don't want to take the time if --

Q. I'm not going to read extensively.

A. I'll just follow along.

Q. If you need to get it, then get it.

A. Fair enough.

Q. So, here we are, it is 1950.

Maybe this is better. All right. Here we go.

A. Yeah.

Q. So Wynder and Graham publish. Graham gives Wynder the first position. This is Wynder and Graham, not Graham and Wynder.

A. Right.

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Q. Graham, two years out of medical school, Wynder the grand old man?
A. Other way around.
Q. Of course. Evarts Graham, the grand old man; Wynder is two years out of medical school.
A. Two weeks. He's not even out of medical school at this point.
Q. Whatever. The point is, Graham gives him the byline in the Journal of the American Medical Association, a very impressive journal.
A. Absolutely.
Q. And what I want to focus on, Mr. Harkness, is not so much what people said, whether they liked him, they liked Graham or they liked Wynder, but what was actually -- what were the facts that Wynder had gotten on these trips? What did he find? What were the real numbers? Not the opinions, but how many people were really dying?

MR. SHEFFLER: Your Honor, I would object. This is -- the graph that's shown now is not -- I don't think a foundation has been laid that this is taken from the article itself.

MR. WILNER: I'll lay it. That's fine.

THE COURT: All right.

BY MR. WILNER:

Q. Mr. Harkness, would you confirm that the numbers that

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Mister -- that Drs. Wynder and Graham recorded in their survey are accurately reflected in this graph?
A. Well, I'll concede that. I don't have them memorized.
Q. Okay.
MR. SHEFFLER: Your Honor, since there is a graph in the paper and since it's being displayed to the jury as such, can we use the graph in the paper?
MR. WILNER: Your Honor, I really don't need Mr. Sheffler to tell me how to cross-examine the witness.
MR. SHEFFLER: Can we come up?
THE COURT: All right. Come on up.
[Bench conference reported as follows:]
THE COURT: This graph is not in evidence; right?
MR. SHEFFLER: No.
MR. WILNER: No. It's a demonstrative.
MR. SHEFFLER: Your Honor, it's not from the paper either, and to have the representation of the paper and below the graph, that this is from the paper, this is the numbers from the paper -- first of all, I have no objection to using the graphs from the paper. In fact, I was going to use them on redirect as well. I would like them to use the graphs in the paper. That was created from testimony in another case by Dr. Feingold. He is not here to lay the foundation for that. Let's use the graph in the paper.
MR. WILNER: I'm allowed to draw a graph for cross-

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examination. I'm not representing it as --
THE COURT: I think if he recognizes it and adopts it. You probably have to go back to the article if he doesn't.
MR. WILNER: He said that was the numbers.
MR. SHEFFLER: He said that you said that was the numbers.
MR. WILNER: This is an obstruction technique.
THE COURT: Wait a minute. What the witness said was, he would accept your version.
MR. WILNER: Okay.
THE COURT: He didn't say he recognized it.
MR. WILNER: Well, I think if he'll accept it, how long are we going to take to go over -- we're not going to need to go over every figure. Your Honor --
THE COURT: You can ask him. I told you you can ask him, but you'll have to lay a foundation.
MR. WILNER: All right.
[Continuing in open court:]
BY MR. WILNER:
Q. Mr. Harkness, you don't dispute these numbers?
A. No.
Q. Okay. What I want to do is try to understand then what the facts were as reported by Wynder and Graham. And so my question is, if we look at what was actually reported in this paper, we see that there really are two sets of people. There

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are the no cancer people, who are the gray lines.
A. Uh-huh.
Q. And the cancer people, who are the black lines. Do you see that?
A. Correct. Yes.
Q. And I'll represent to you that, you know, I created this graph from the numbers. This isn't the actual graph in the paper because it's the paper -- it's too hard to see. My copy doesn't look so good, and this is easy to see. You'll accept that?
A. Sure. I'm looking at -- fine.
Q. Okay. So among -- so you take the smokers and the nonsmokers, and then you divide them up to see whether they got cancer or did not get cancer. Isn't this what he did?
A. Yes.
Q. And he found that among the smokers, that the percentage of cancer was much higher than among the nonsmokers. The nonsmokers, it was 1.3. The smokers, it was 91.
A. Right.
Q. Now, if there had been no effect of smoking, then this graph should have looked like this [indicating], two flat bars over here, the same number, two taller bars over there, since more people smoked than didn't smoke; right?
A. Okay. Yeah.
Q. So I will call this the -- what the statisticians would

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call the null result would have looked like. We would have had a gray bar here, a black bar; a gray bar and a black bar; nonsmokers, smokers. Instead of this graph which has this split in it, we would have had graphs that were -- I don't mean, you know, flat like a table, because there are always random variations?
A. Right, right.
Q. But we wouldn't have seen a signal out of the null; right? We wouldn't have seen a signal.
A. Right.
Q. So what Wynder was saying is, this is a signal; right?
A. In essence.
Q. Okay. And this was 1950.
A. Correct.
Q. Right?
A. Right.
Q. Now, Wynder, as you said before, was not accepted a hundred percent in the -- among what you call the medical community.
A. Right.
Q. Okay? Now, tell me, if you could, who published not an opinion about Dr. Wynder, but a graph that looked like no signal.
A. I'm -- I'm not aware of anyone.
Q. Ah. Although there were people who said they didn't like

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the way they did it or they had some other objection to him or maybe he was not a good personality, nobody published a study that showed he was wrong?
A. Correct.
Q. And Dr. Hanmer of the American Tobacco Company would have known that nobody published a study to show he was wrong?
A. I suppose.
Q. Now, when Dr. Hanmer and the American Tobacco Company is looking into the question of whether their products cause harm, are they looking at facts, or are they looking at people's opinions?
A. I'm not -- there was a fact that the medical community didn't agree about the interpretation of Wynder's results.
Q. Well, isn't that opinion?
A. As a historian, I have evidence that that was a fact.
Q. It was a fact about what people's opinions were.
A. Yeah.
Q. Okay. Now, so you're saying that in making their decisions as the American Tobacco Company, were they using the facts or were they using opinions?
A. Maybe this is a historian talking to a lawyer, but what I'm saying is that there is a reality that -- a historical reality that there was not agreement among scientific experts.
Q. Okay. Well, let's explore that just for a minute. What didn't they like about him?

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A. Well, do you want to talk about specific people?
Q. Whatever.
A. There were concerns about -- E. Cuyler Hammond of the American Cancer Society, who went on to do prospective studies, is a good example of this. He had concerns about interviewer bias and interviewee bias in retrospective studies. He lays this out pretty clearly in an article that was published in the Connecticut Journal of Medicine in 1954, which we could turn to, if you want.
Q. No. I want you to go ahead and tell me, and then we'll ask. So the first one -- I'm going to write these down.
A. Okay.
Q. The first one was Hammond.
A. Right.
Q. There's a lot more coming about Hammond; right?
A. Sure.
Q. Because Hammond ended up doing his own study which not only ratified and verified Wynder; it went way beyond Wynder in its power, its statistical power. Right?
A. Right.
Q. But when Wynder first came out, okay, Hanmer said, well, there might be interviewer bias; right?
A. Right.
Q. Now, let's just talk about that for a minute. Hanmer -- Hammond. Hammond was on the American -- was on the American

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Cancer Society; right?
A. Biostatistician of the American Cancer Society.
Q. Here is this guy, he is a biostatistician for the American Cancer Society. He comes out, Wynder, and says, by golly, I've gone out as a nobody and collected something that could be hugely important. And Hanmer's reaction is to say, not so fast.
A. Hanmer or Hammond?
Q. Hammond, of course. He said, not so fast?
A. In essence.
Q. He said, wait, we're going to do it my way. True?
A. Well, I mean, he first said -- and, I mean, I have evidence from the Graham papers that he was quite vociferous in saying that Wynder's results, they were lousy.
Q. And then he said, we're going to do this my way. I'm going to do a study the way I want to do it.
A. Correct.
Q. Says Hammond of the American Cancer Institute; right?
A. Setting out, in his mind, to really disprove.
Q. Right, right. But what happened, when Hammond in 1954 -- it was a blockbuster, wasn't it?
A. Yeah.
Q. And it proved Wynder was right.
A. Well, it proved to some.
Q. Okay. Well, we'll go up to '54 and talk about those data.

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But let's just go back to Dr. Hammond who --
A. It proved to Hammond, certainly.
Q. In 1950, he was a doubter; right?
A. Yes.
Q. Who else?
A. Well, now, one thing I want -- and we can talk about some head counting, but one thing I want to emphasize, in understanding the nature of opinion within the scientific community, this is not a matter of counting heads. I mean, science isn't a democracy. It isn't sort of one man, one vote. Someone like E. Cuyler Hammond, who is the head biostatistician of the American Cancer Society, calls this research into question, that is a major piece of criticism.
Q. Okay. We just talked about Hammond. Let's go on.
A. All right. I was just trying to clarify the significance, put it into context.
Q. In fact, you're the one who has just said it's not a democracy; right?
A. Right.
Q. All right. So scientific reality is not determined by a bunch of votes or opinions, is it?
A. Right.
Q. It's facts; right?
A. No. I mean, that's --
Q. No?

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A. That is a way of viewing science that I think diminishes the complexity of the enterprise. We look back on it now, and, yes, Wynder's facts look right. What my testimony is, it was messier at the time. They didn't have the benefit of hindsight, these scientists.
Q. Well, let's be messy, Doctor. Who else besides Hanmer [sic], who would later verify the study, in fact, in just about four years, who else? And why?
A. Well, there was Alexander Gilliam. There's a bunch at the National Cancer Institute.
Q. Let's try to make order of this, not just to say they didn't agree with it or whatever. Gilliam. All right? What was his beef?
A. Well, got an article by him that appeared in Military Medicine. Let me just refer to it here.
Q. Okay. That's the one -- did you try to show that on direct? Is that one of the ones you pulled out?
A. No, huh-uh.
Q. Okay. Whatever.
A. I have a lot more.
Q. What's his beef? What's his beef?
A. Excuse me. First of all, let me tell who he is before I talk about his beef. He was from the biometry and epidemiology branch of the National Cancer Institute. So he was an epidemiologist.

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Q. Okay. What's his beef?
A. He -- in essence, he's not convinced by the evidence as it exists, that he's concerned about the retrospective studies that aren't solid.
Q. What do you mean, aren't solid?
A. Well, he had these concerns about interviewer bias.
Q. What concerns?
A. I mean, they don't all have different concerns. A lot of the concerns are the same as Hammond.
Q. Interviewer bias.
A. And also the bias of the people being interviewed.
Q. So that means that -- you mean --
A. The possibility of that.
Q. Wait a minute. Let me just get to the bottom of this.
A. Sure.
Q. When you say interviewer bias, what is it? That somebody is going to lie about whether they have cancer or not?
A. Well, that would be interviewee bias.
Q. Oh, you mean the interviewers are biased. Oh, the doctors are biased. Wynder is biased. That's what they were saying?
A. Yeah, that -- yes.
Q. Oh, okay. So this went to -- so, in other words, because Wynder was kind of a -- why did they think he was biased? Because he was an emigrant?
A. No. Maybe I could just kind of give a little example, a

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little explanation of this.
Q. I think -- I'm just trying to get to the bottom of what their beef was. And their beef was with Wynder because they thought he was lying about the data?
MR. SHEFFLER: Your Honor, if the question is asked, the witness is in the middle of an answer, could he be permitted to answer?
THE COURT: Yes. The witness can be allowed to answer the question.
BY MR. WILNER:
Q. Please answer.
A. Okay. I think the source of concern about bias didn't have a lot to do with Wynder's personality, I mean, perhaps other than he was driven and was committed to the idea that smoking caused lung cancer. And the concern with something along these lines, that Wynder or one of his assistants -- and he did have some assistants at this point. Adele Croninger was the most significant one. She had a master's degree in geology. That was her preparation for this work. Anyhow, they would be talking with a patient -- and this is sort of an explanation of how bias could occur in the view of people like Hammond and others who were concerned about these retrospective studies. That the interviewer, somebody like Wynder, knows or believes that smoking causes lung cancer. He is talking to a lung cancer patient. That lung cancer patient, when asked if

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he or she -- if he smokes. These are all men. When asked if he smokes initially says, no, never smoked. And the concern was on the part of Hammond that Wynder or someone in his position might at that point press for more, say, "Are you sure you never smoked? You mean you never smoked in your whole life?"

And then he would get the answer, "Oh, yeah, yeah, yeah, I did. I did smoke for a while a decade ago," or something."

Conversely, the interviewer might be talking to a non lung cancer patient, ask if they smoked. The person answered, "No, I don't smoke." In essence -- again, this is not my concern, the concern of Hammond and others -- that would be an answer that Wynder liked, so he would stop. He wouldn't push for more.

Q. Of course, all of that was proven that the study was perfectly right; right?

A. Yes. Retrospectively, looking back on it now with the benefit of hindsight.

Q. Okay. So Gilliam said, oh, maybe Wynder didn't do his interviews right. Hammond said the same thing. Who else?

A. Harold Dorn. He was a biostatistician at the National Cancer Institute, was very concerned about the quality of the studies.

Q. What about?

A. Well, and one of Stanley Brookes' reports, he is reporting

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that the graphs are too perfect, everything looks too clean, that things don't usually look that way.
Q. You've looked at the paper. Do you think the graphs are too clean?
A. I mean, I'm not here to judge the paper. What I'm telling you is that Harold Dorn -- it doesn't really have much to do with anything whether I think the graphs are too clean.
Q. Harold Dorn, actually speaking through this guy Stanley Brookes -- who was hired by the cigarette company. Is that the deal?
A. Yeah. Harold Dorn, I have an article that he published.
Q. Okay.
A. If I can find it here. If you can bear with me, please.
Here we go. This is published in the American Journal of Public Health, in the May 1955 issue. It was presented at a meeting of the American Public Health Association, October 14, 1954. He is generally just talking about the messiness of establishing -- "The words association, causation, etiology appear over and over again in discussions of a current topic in cancer and the use of tobacco in cancer of the lung."
Q. What? I don't understand that. What is his beef?
A. He is essentially saying that the retrospective studies are not entirely reliable. And, again, Harold Dorn is someone who carried forth with his own prospective study, somewhat akin to Hammond.

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Q. All right. So all that stuff about causality and everything, what you're saying is a retrospective, which means you go and ask the patient, that's more of that interview bias; right?
A. Yeah.
Q. All right. So you had these guys, Hammond, Gilliam, Dorn, they said, oh, you know, maybe Wynder didn't do the interviews right. Okay. Fine.
A. Well, and Dorn was also saying, according to Stanley Brookes, and I have no reason to doubt it, the veracity of Brookes' report, that Dorn was saying the graphs are too perfect, that things don't work out this way, this cleanly.
Q. What graphs?
A. The graphs presumably in Wynder's publication and graphs that Dorn had been -- Dorn had been at meetings where Wynder had presented his results.
Q. Okay. I mean, have you looked at how -- I asked you before, you've looked at the graphs in the paper. They don't look perfect at all, do they?
A. You're asking -- that's what Harold Dorn said. That was Harold Dorn's concern. He was the biostatistician, the head of biostatistics at the National Institutes of Health.
Q. So whatever he said, whether it was silly or not, that's just what you're reporting?
A. And it means something. I mean, silly in retrospect, but

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I don't think it's fair to call someone who holds the position of the head biostatistician -- head of biostatistics at the National Institute of Health silly.

Q. Well, maybe their opinion was silly if they said the graphs were perfect and they're not?

A. Retrospectively, we can say that, but as a historian, what I'm reporting on is what was going on at the time.

Q. But the paper was there at the time. There was no discussion -- this paper was published in 1950. Everyone could see what the graphs were. Someone was saying the graphs were perfect, when you can see for yourself they're not. That's not silly?

A. You're saying it's silly.

MR. SHEFFLER: Your Honor, are we getting into argument?

THE COURT: I think we are.

MR. WILNER: I agree.

THE COURT: Let's go on to another question, maybe.

MR. WILNER: Time for the next one.

BY MR. WILNER:

Q. Let me ask you this: Could Hanmer, if he was put off by Dorn, if he said, oh, the great Dr. Dorn, he says don't listen to Wynder because his graphs are too perfect, couldn't Hanmer have gone to the paper and seen for himself?

A. He might have. But --

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Q. Okay.
A. But -- fine.
Q. So you think he didn't. He just listened to Dorn. He said, oh, the graphs are too perfect. Whatever. I didn't even bother to look.
A. Okay.
Q. Okay. So I'm back to these, you know, all this negativity. Let's hear it. Let's have it out. Let's get to the basis of it.
So Dorn says interview bias, graphs too perfect, although we said that -- or you say, admit now that in 1950, when he said that, the graphs weren't perfect. Okay. So let's go to --
MR. SHEFFLER: Object, your Honor, and move to strike the commentary, which is --
THE COURT: Well, I'll sustain the objection. Let's go to the next question.
MR. WILNER: All right. We're going to the next question, if we can.
BY MR. WILNER:
Q. All right. Who else?
A. Let's see. We have Yerushalmy and Palmer in 1959, George Saiger in --
Q. '59? Wait a minute. We're all the way up in 1959? How many studies went on in the '50s?

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A. There continued to be -- I mean, Joseph Berkson, there continued to be doubt among people, the retrospective studies and the prospective studies.
Q. Berkson?
A. Sure.
Q. Joe Berkson was paid by the cigarette companies.
MR. SHEFFLER: Objection. Your Honor, there has to be some foundation for some of these claims at some point.
MR. WILNER: There is, your Honor. I have a document that shows he was paid by the cigarette companies.
THE COURT: Well, let's just ask questions.
BY MR. WILNER:
Q. Was Joe Berkson paid by the cigarette companies?
A. Not in the period that I'm looking at, as far as I know.
Q. Oh, you didn't -- okay. All right. I'll show that to you.
All right. So Joe -- let's stick with the 1950 critique. Okay? All these people don't like what Wynder did. I want to get to the bottom of this. They said -- I've got Hammond, Gilliam, Dorn. Brookes is just -- he's -- Brookes is the guy that -- he's hired by the tobacco company; right?
A. To report on what others thought in the community, in the scientific community about this research.
Q. Paid by the tobacco company; right?
A. Brookes was paid to go out and gather information, yes.

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Q. Okay. Who else?
A. I -- to me at some point -- I mean, there are other sources, for example, textbooks, where you can get at the sort of tenor of the times. The people I've listed here, yeah, it doesn't look like very many on a piece of paper. And I could go through and try to give you a laundry list of people who thought this way. But there is a controversy. It isn't a settled deal in the scientific community.
Q. I appreciate you repeating your testimony, but I'm trying to bore in on exactly what the beef was. Can you tell me any other legitimate criticism of this than you have done so far, which is interviewer bias and --
A. Interviewee bias.
Q. Interviewee bias or interviewer bias, whichever.
A. Right.
Q. And you had some other one that I can't remember. Oh, that the graphs were too perfect. Okay.
A. Yeah.
Q. That was it? That was all -- all the criticism boiled down to that?
A. Sure.
Q. And all of that criticism could have easily been dealt with if Hanmer -- if American Tobacco Company wanted to look seriously at what this work was, they could look at that criticism and decide whether that criticism was valid, couldn't

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they?
A. I don't agree with the premise of your question. I mean, that suggests that Hammond wasn't being serious when he criticized the studies.
Q. Couldn't Hanmer decide for himself at the American Tobacco Company whether Wynder was valid without having to listen to all this stuff about somebody said that he had interview bias, somebody was in a different organization and wanted to do it themselves? We don't agree. We do agree. Why didn't he just look for himself?
A. I mean, I think in some ways it's very reasonable that he didn't, because he was a chemist, as we've talked about. So he's sending Brookes to go talk to other biostatisticians, he's reading the interpretations of the head biostatistician at the American Cancer Society.
Q. And that's the best he could do; right? He couldn't hire a statistician to look for himself?
A. He didn't.
Q. Okay. So let me move on a little quicker. Wynder was not the only one in 1950 who reported this kind of a thing, was he?
A. No. He wasn't.
Q. And, in fact, there were others who were consistent with Wynder; right?
A. Right. There was another -- yeah.
Q. Levin and Goldstein published in the same issue of JAMA;

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right?
A. Yeah.
Q. A study of 1,045 male cancer patients admitted to the hospital and 605 controlled?
A. Right.
Q. They said, "These data indicate that, in a hospital population, cancer of the lung occurs more than twice as frequently among those who have smoked cigarettes for 25 years than among other smokers or nonsmokers of comparable age."
"The data suggests, although they do not establish, a causal relationship between cigarette and pipe smoking and cancer of the lung and lip respectively."
Do you agree?
A. Yeah. It's useful to go on and read the rest of it.
Q. Well, I only have this excerpt. You can read whatever you want.
A. Following right on that.
"The statistical association may, of course, be due to some other unidentified common factor between these types of smoking and lung and lip cancer."
Q. It may. Right?
A. Right.
Q. Or it may be due to smoking; right?
A. Right.
Q. So did they criticize Levin and Goldstein, too? Same guy?

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A. Yeah.
Q. Same reasons?
A. Pardon me?
Q. Same reasons? They were biased, too?
A. The possibility existed in the mind of the critics.
Q. So the critics that Wynder was biased, now Levin and Goldstein are biased?
A. Possibly.
Q. Now let's go to another one. Schrek, Ballard, "Tobacco Smoking as an Etiologic Factor in Disease," Cancer Research, in 1950?
A. Uh-huh.
Q. I'm moving fast. "This positive correlation between the incidence of cigarette smoking and the incidence of cancer of the respiratory tract appeared to be both statistically and biologically significant. There is strong circumstantial evidence that cigarette smoking was an etiologic factor in cancer of the respiratory tract."
That's 5,003 hospital admission records. These were admission records; right?
A. Right.
Q. How can they be biased about that? Not interviewing anybody.
A. Correct.
Q. So did the same doubters, did they come down on Schrek

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Ballard and say those guys are biased, too?
A. My impression as a historian is that these doubters grouped the retrospective studies together and issued up their concerns about that whole approach to epidemiology.
Q. Even if you could tell that, -- even if you're just doing a hospital admission, that you're not going to have interview bias?
A. Yes.
Q. Yes. So, all right, same here, Mills and Porter. This is support for Wynder, isn't it: Cigarette smoking seems to bear a highly significant relationship to cancers of the respiratory tract. Still, 1950, 5,058 men dying of lung cancer matched against population controls for smoking history.
Again, bias?
A. Again, that's what the critics were concerned about.
Q. The critics. All right. Let's talk about Doll and Hill. Did you talk about them? Sir Richard Doll?
A. Yesterday?
Q. Yes.
A. I don't believe he came up. I'm certainly familiar with his work.
Q. Well, Sir Richard Doll. Tell the jury who Sir Richard Doll was, or is. He's alive.
A. In the beginning of our story, he's not Sir yet. Richard Doll, he was an epidemiologist, biostatistician in Britain and

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did with Bradford Hill, his senior colleague, research retrospective and then prospective research on the smoking/lung cancer question in Britain.

Q. And he did a study of 709 lung cancer hospital patients and 709 controls. True?

A. Yeah. Yeah.

Q. Only two cancer patients were nonsmokers. True?

A. Yes. I mean, I don't remember the study in that level of detail, but I'm not going to contest what you're saying.

Q. Okay. "Above the age of 45" -- I won't go into that.

"It must be concluded that there is a real association between carcinoma of the lung and smoking."

That's what they said, basis of their data; right?

A. Right. Now, the important word there is "association," as opposed to causation.

Q. Well, they say there's an association, and that means that these things are together; right?

A. Right.

Q. So let me ask you this: Did you find any evidence that the American Tobacco Company, Hanmer or whatever, said that what -- were able to say publicly to their customers that there was an association between cancer and the products they were making in 1950?

A. I found no evidence of that.

Q. "We therefore conclude that smoking is a factor and an

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important factor in the production of carcinoma of the lung."
What is a factor?
A. Contributing -- I mean, a factor. I think in the mind of an epidemiologist, it's something less than a cause. It's a contributing thing.
Q. All right. So now let's see if these were -- about these words. So if you're a cigarette smoker and you're worried or you want to know whether you're going to get cancer, then if it's a factor and an important factor in the production of carcinoma of the lung, wouldn't you want to know about it?
A. Yes.
Q. All right. So the fact that somebody says, well, I know it's a factor, but I don't know that it's a cause, that would not affect how important it is to people who are at risk of dying; right?
A. Right.
Q. Okay. So Doll and Hill. Sir Richard Doll and Hill in Britain, were they biased?
A. Again, that was the concern of people who were not convinced by these retrospective studies.
Q. Well, what would be the chance that everybody was biased? Wynder was biased, Levin was biased, Schrek was biased, Mills was biased, and Doll was biased, and they found all the same thing and they were all biased. What's the odds of that?
A. I don't know, but I'm telling you that, again, the

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historical reality is that there was not an immediate, widespread acceptance of these results as conclusive.
Q. And the factual reality was that they all agreed and they all showed that smoking did it; right?
A. I think even some of the authors of these retrospective studies didn't go quite that far.
Q. Because they were just doing one study; right? But if you combine the effect of these studies one after the other, Wynder, Levin, Schrek, Mills, it's only 1950, and now Doll comes in and says, we knew -- we find the same thing. So an observer like a tobacco company wouldn't be stuck with just one; he could go and read. He would read Doll and Hill, "Smoking and Cancer of the Lung," British Medical Journal, 1950, and compare them, wouldn't he?
A. Well, this is Doll reflecting in a PC published in a journal called Statistical Methods in Medical Research in 1998. It's a carefully compiled history based on his recollections and also lots of documentary evidence. At this point, he is Sir Richard Doll.
Quote: Cigarette smoking is a factor, an important factor in the production of carcinoma of the lung. This conclusion was not accepted generally by either medical or statistical scientists and certainly not by the British Health Department's Standing Advisory Committee. Most accepted that an association had been shown, but not that the association implied cause and

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effect.
That's Doll's recollection of his reception.
Q. Exactly. In 1950, at that point, there were at least four studies which agreed more or less completely?
A. Yes.
Q. Okay. Now let's go to an editorial which came out that same year in the British Medical Journal which commented on this. You just said what was said later. Let's see what was said at the time. Are you familiar with the editorial from the British Medical Journal, 1950?
A. I am. I don't know if I have it with me. I might.
Q. Let me see if I can put it up.
A. No, I don't have that one with me.
Q. Let me see if I can shorten it. This was a discussion of the -- actually, the British Medical Journal here, up in this little corner, that had just published Doll and Hill's results; right?
A. Okay. Yeah, yeah.
Q. Okay. So he says, "The results are open to the criticism that the control patients were interviewed by different examiners and were not drawn from the same parts of the USA as the cancer patients."
They're talking about Wynder and Graham's work. Sorry.
"Serious though this is, it would not appear to have biased the results, for the assistants who interviewed the

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general cases also interviewed a subgroup of the cancer patients."

So he is discussing this issue of bias; right?

A. Yes.

Q. Then he says, "Wynder and Graham further added the observations that patients with cancer of the lung smoked their tobacco disproportionately, often in the form of cigarettes," blah, blah. Then he goes down to the bottom and says, "Levin, Goldstein, and Gerhardt have reached the same conclusion."

Some of those people we talked about a minute ago; right?

A. Right.

Q. "Their investigation was less elaborate, but wider in scope, and they were able to find a relationship between pipe smoking and cancer of the lip as well. These reports provide an important advance in knowledge. If they are confirmed, it will still remain to trace the carcinogenic agent and to apply the lesson. Meanwhile, strong support has been given to the existing financial reason for not smoking."

Do you agree with that?

A. Well, I mean, I agree that that's what's there, yeah. That's their opinion.

Q. You don't agree with that being the opinion of what you call the scientific community, or whatever that is?

A. Yeah. It wasn't a unanimous or even, I wouldn't say, the consensus of opinion, but one taken.

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Q. All right. Another article, I'll just move through these quickly, another editorial, the British Medical Journal, the same year, 1950. "The proof that cancer of the lung is associated with smoking must obviously be based on statistical and not on clinical evidence."

Why is that?

A. Pardon? I was looking at something else.

Q. That's all right. I'll withdraw, in the interest of time.

Throughout 1950, 1951, Graham publishes, Wynder publishes, Doll and Hill published in 1952, and they say, the British Medical Journal, 1952, "In a previous" -- incidentally, who was Bradford Hill?

A. A biostatistician in Britain.

Q. Just a --

A. He was one of the world's leading biostatisticians.

Q. So when you say that there are some guys at the National Cancer Institute that disagree, I mean, Bradford Hill, he was a serious, serious medical authority?

A. Yeah. And in biostatistics, yeah. Perhaps his reputation was only exceeded in Britain by Ronald Fisher, who we haven't talked about at all, and was a significant doubter of the quality of the statistical evidence relating smoking to lung cancer.

Q. And who was on the payroll of the British-American Tobacco Company.

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MR. SHEFFLER: Again, your Honor, I don't --
THE COURT: Ask a question, if you would.
BY MR. WILNER:
Q. Was he -- was Sir Ronald Fisher on the payroll of the British-American Tobacco Company?
A. I'm not sure. He was a very obstinate guy, and I don't think he would have been swayed by money, regardless.
Q. "In a previous paper we concluded that smoking is a factor in the production of the carcinoma of the lung, and this conclusion was in conformity with the results of some other investigations. We have now extended the investigation to other parts of the country and have made more detailed inquiries into smoking habits."
And they go on to say that their 1952 paper confirms what they said in 1950. Do you agree?
A. Sure.
Q. And then in 1952, Ochsner publishes, and he says, "For some time two of us have been convinced there is a causal relationship between the increased incidence of bronchogenic carcinoma and the increased use of cigarettes. There is a distinct parallelism between the sale of cigarettes and the increased incidence of bronchogenic carcinoma."
And then I wanted to read this to you, and you tell me if you agree with this or don't agree with this as representative of the thinking of the time. This is from the Journal of the

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American Medical Association, 1952, by Ochsner, DeCamp and DeBakey. Are you familiar with that article?
A. Yes.
Q. "It is frightening to speculate on the possible numbers of bronchogenic cancers that may develop as the result of the tremendous number of cigarettes consumed in the two decades from 1930 to 1950. Because of increased cigarette smoking, it is likely and probable that bronchogenic carcinoma soon will become more frequent than any other cancer in the body, unless something is done."
"Unless something is done to prevent its increase."
Now, were those ominous words for 1952?
A. Retrospectively they sound quite ominous. I don't think they represented the general consensus of opinion at the time.
Q. And they were so right, weren't they?
A. Again, looking back on it retrospectively, in a rather ahistorical and unhistorical fashion, yeah.
Q. When did bronchogenic or lung cancer pass all other kinds of cancer as the most frequent cause of death?
A. I don't know.
Q. You didn't see that in your medical research?
A. No.
Q. No question that it did?
A. I think so, yeah.
Q. Okay. So throughout the early 1950s, did authors continue

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to publish these studies and did they continue to be consistent?
A. Yes, and there was also a consistent literature of expressions of doubt.
Q. Expressions of doubt, but no contrary evidence.
A. Well, there were negative results that appeared in animal experiments with some regularity.
Q. Animal experiments? Back to the mice.
A. Mice and other animals, yeah.
Q. Okay. And so maybe this is leading up to the -- well, in just a minute --
A. All right.
Q. In 1953, did Doll and Hill say that when they continued to do their British physicians' study, that the evidence was so clear, that it amounts to proof?
A. That's what they said, yes.
Q. And that was Sir Richard Doll and A. Bradford Hill, one of the leading statisticians of Great Britain?
A. Yes.
Q. And do you think that it would be likely that there would be a cause -- that proof would exist in England, but that proof somehow wouldn't apply in the United States?
A. Well, I agree that that was Doll and Hill's opinion, that there was proof. I do not concede that the physicians in Britain uniformly agreed that it was proof, or scientists, and

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likewise in the states.
Q. You used an interesting word there, Doctor. You said "uniformly." And I guess my question is, you are presenting the testimony that there was no uniformity. Right?
A. I would actually like to retract that word. What I'm looking for is a sense of consensus among medical scientists, which is something less than uniformity.
Q. In 1953, Wynder, Graham, and Croninger published their -- what's been called their mouse painting study. Is that correct?
A. Correct. Late 1953.
Q. And you're familiar with that?
A. Yes.
Q. Can you get it out?
A. Sure.
Q. Now, one of the things that's interesting in this study --
THE COURT: Mr. Wilner, excuse me. Does this have an exhibit number?
MR. WILNER: Yes, it does. This one happens to be 2448.
THE COURT: Thank you.
BY MR. WILNER:
Q. Is that focused or is it my eyes?
A. It's fine for me.
Q. It's my eyes. All right.

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So this was the -- do you remember when Wynder back in 1949 had said, gosh, I'm looking ahead. I'm looking to find whether there's a carcinogen in the smoke; right?
A. Right.
Q. And a lot of the guys at the Cancer Institute and certainly the tobacco industry had said, well, you know, those studies where you see how many people died, we don't trust those until you can prove it in a laboratory. Wasn't that the --
A. Right. I mean, there was a difference of opinion on that. I mean, Dorn, according to Brookes's report, was saying when we solve this study, it's not going to be with animals. It's going to be with surveys. So there was a difference of opinion on how to approach the problem.
Q. But there was a problem with trying to use animals to get lung cancer, which we talked about before, because they didn't live long enough, you couldn't put enough smoke in them, and trying to use mice didn't necessarily prove one thing or another, when they inhaled smoke; correct?
A. Looking back on it, there were some who thought that because mice were exposed to smoke and didn't get any sort of lung cancer, that that was evidence that smoking wasn't -- or tobacco was not carcinogenic.
Q. But Wynder and Graham decided to see if they could find at least some -- a reaction of cancer in a mammal from a substance

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in cigarette smoke; right?
A. Yes.
Q. And they never claimed that that in itself, standing alone, would prove that -- would prove much of anything, except it would give some biologic plausibility to what had been assembled a huge mass of epidemiologic evidence. True?
A. In the Time magazine article, I would say it went even further than that. They claimed that it was beyond any doubt.
Q. Well, let's see exactly what they said in their article.
A. Right. Which is important.
Q. First, they give a -- I didn't mean to take that off.
First they give a little background. Isn't that common, to give a background when you do an article like this?
A. Yeah.
Q. They say, "The increasing frequency of primary cancer of the lung in many parts of the world has aroused great interest in this condition and has stimulated a search for an explanation. In 1950, Wynder and Graham" -- and they do a citation to their paper; right?
A. Yes.
Q. Right there. -- "on the basis of a clinical and statistical investigation, presented evidence of a real association between lung cancer and smoking, especially of cigarettes. These data have been well substantiated by a large-scale British study by Doll and Hill. Both studies

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showed that the direct proportion" -- I'm sorry -- "that the risk of developing cancer of the lung increases in direct proportion to the amount of smoking. Ten other recent studies reached similar conclusions."

Do you see that?

A. Yes.

Q. And they give the studies. "In 1952, the Council of International Organizations of Medical Sciences convened a symposium on the endemiology of lung cancer and agreed that the present evidence points to a relationship between lung cancer and cigarette smoking."

Now, do you take issue with their analysis of what had gone before 1953?

A. I don't take issue with it, but there were other scientists at the time who would not have believed that things were quite as tidy as Wynder and Graham and Croninger were presenting things there.

Q. Tell us what their beef was.

A. We've already been over that.

Q. All we're talking about is all these different -- ten other recent studies. You mean that's the interview bias again? Now it's up to ten?

A. Yeah. There was concern about the quality of that type of research.

Q. So, I mean, were there people that were just going to be

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concerned about it no matter what?
A. Yes.
Q. So then they went on to look at all the evidence that had come in in the past about what happens when you try and put cigarette tar on mammals in different places, and they showed their little smoking apparatus here where they tried to get the tar out of the cigarette; right?
A. Right.
Q. And then they went ahead and they charted their results of the mice, and 44 percent of the mice that were painted got cancer, and none of the control.
A. Right. I should think it's important in terms of the context of this study to give a little bit of attention to another aspect of their sort of introduction to the essay where they talk about, "From the survey of the literature, previous animal experiments with mice, it is found that before our study, all the previous attempts to produce experimental cancer in mice with tobacco products were successful in the production of only seven epidermoid cancers of the skin."
"At any rate," skipping down a little bit, "so far these methods have not produced true bronchogenic carcinoma," talking about inhalation studies.
So they're acknowledging here that their study stands out from previous negative results which had been obtained, which I think goes a long way towards explaining the sort of surprise

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and skepticism that the scientific community -- with which the scientific community greeted this research.

Q. So first you had, I don't know how many, ten, 12, 15, maybe more consistent people studies, and then -- and you still had doubters; right?

A. Right.

Q. And then you had Wynder and Graham come along and say, well, what we want to do is show that there's a carcinogen in the smoke that can affect tissues of a mammal, and we've got 44 percent positives in what we put on and 0 percent negatives. Well, I didn't state that completely --

A. I understand.

Q. You understand what I mean. Right? And that all happened; right?

A. In this study, yes.

Q. In that study. And, as you say, there was still doubt.

A. Right.

Q. Okay. This will be -- let me take a second here. We've come up to 1953, and we've now had, as I said, 20 or so, I don't know exactly how many, but many, many consistent studies, no inconsistent studies, and now we have at least one experiment that shows biologic plausibility that a cancer, carcinogen might be in there. You'll agree with all that?

A. Yes.

Q. So, now, remember Dr. Hammond of the American Cancer

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Institute? American Cancer Society. Pardon me.
A. Yes.
Q. Yeah. He was the one who said to Wynder, or, in effect to Wynder -- he actually did address him, too, didn't he? They did meet, and there was some animosity there.
A. It comes through in their correspondence.
Q. Okay. So Hammond was one of the ones who was saying, hey, I'm in the American Cancer Institute, and if we're going to do these epidemiologic studies, I'm going to do it my way. I'm going to do not a backward study, but a forward study. So I'm going to do the biggest study in history. Right?
A. In essence, yeah.
Q. Okay. I'm going to look at not the couple hundreds or the thousands of people who have been looked at before, but I'm going to look at -- I'm going to survey the United States of America. I'm going to survey over 187,000 people, and I'm going to determine whether they smoke. And then, so that there's no bias, we're going to watch them and see who gets cancer. And there can't be any bias because we won't know who is going to get cancer when we talk to them. So we won't -- we couldn't be biased. And we know we're going to watch them and then we're going to see who develops it.
MR. SHEFFLER: Your Honor, is this a question? Or is this a --
THE COURT: I haven't seen a question mark yet. Do

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you have a question mark on there?
MR. WILNER: Question mark. Let the record show my question mark.
BY MR. WILNER:
Q. Isn't that what they were doing?
A. I lost my train, unfortunately. Your train.
Q. Well, I'm sorry. I was trying to explain the difference between these forward studies and these backward studies. Okay?
A. All right.
Q. And I'll try and do it shorter. But this was important because these people were criticizing the backward studies on bias; right?
A. Yes.
Q. And so the way you avoid bias with a forward study is because you don't know who is going to get cancer and who isn't; right?
A. Right.
Q. The interviewer can't be biased, because all you're doing, you go out and say, "Do you smoke?", you take all the data, you put that file away. And then --
A. There was an opportunity for bias that was raised by Berkson and others.
Q. Oh, Berkson.
A. Right.

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Q. But Hammond, this was designed by Hammond, the lead statistician of the American Cancer Society, to avoid any possibility of bias?
A. He thought it would avoid bias. There's actually a very interesting exchange between Adele Croninger and Graham from the Graham papers where Croninger is commenting on how silly and absurd this plan is to use volunteer women from the American Cancer Society to do the interviews, and I think this is a bit of turnabout here.
Q. Sure.
A. Because part of the reason Hammond had criticized the Croninger/Wynder/Graham retrospective studies is, he was saying Croninger wasn't qualified to do the reviews. So she is saying, now that she's seen an article about the way this American Cancer Society study is going about the use of volunteer women from the American Cancer Society to do these interviews, Croninger says this in a letter dated February 26, 1952: "What amazes me is how a person supposedly as scientific," and she uses the scare quotes, "as Dr. Hammond purports to be could stoop so low as to recruit the local ladies' aid to do his interviewing for him. It is too funny, and knowing these particular ladies" -- I think this was from her hometown newspaper -- "it is positively screaming."
Q. So who cares?
A. All right.

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Q. I mean, so somebody said that he shouldn't use the ladies. What should he use? Men?
A. She was just saying that that sounded like a sloppy -- I mean, in essence, a sloppy way to run a study.
Q. Well, was that -- was the critique of the Hammond/Horn study, was there somebody who put together a study that said here's Hammond and Horn and here is exactly what they did wrong: They used women, they should have used somebody else, and here's why it's wrong, and this is important, and we're going to back it up?
A. This is important, we're going to what?
Q. We're going to back it up. We're backing up these challenges to Hammond and Horn. Not just, you know, flip it out there, say, wait a minute. We're men. Whatever.
A. But there were people who were issuing up methodological critiques of the study in the scientific literature.
Q. We'll get back to that.
Let's see what Hammond and Horn actually found. And to do that -- actually, their research went on to 1958 when the final -- it was published first in 1954; right?
A. Right.
Q. And it was powerful in 1954; right?
A. Right.
Q. And then they extended the -- well, actually, it was intended to run four years, at least; right? When they first

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started?
A. I think that's right, yeah.
Q. But it was such an important thing that they were getting that they decided to publish it in 1954, which was actually ahead of time.
A. Yes, yes.
Q. And then they went ahead and they said, well, we're keeping up with this. We're going to publish it in 1958. We'll publish the full results. True?
A. Yes.
Q. Okay. All right. So you're familiar with -- let's look at the '58 study, which really includes all of the work-up until then; right?
A. Yes.
Q. Smoking and death rates, reports on 44 months of follow-up of 187,783 men; right?
A. Right. I don't have that one with me, so --
Q. All right. Well, I'm just going to show you a graph. Okay? Actually, there's a better -- there's a clearer graph. Hammond testified in the 1957 hearings. Do you remember that?
A. Yes.
Q. The Blatnik committee?
A. Yes.
Q. I think he presented his charts and graphs at that time, so that would be a little earlier. Let me use that one.

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A. Fine.
Q. I'll go to the Blatnik committee in a minute, but this was the --
A. I don't have those full hearings with me.
Q. That's all right. If you need to see this, I'll get it to you.
Okay. I'm going to -- first let me explain what this is. These are the hearings --
MR. SHEFFLER: Your Honor, may I give the witness a copy so he can follow along?
MR. WILNER: Sure.
THE COURT: Sure.
MR. SHEFFLER: This is mine. I've got some marks and --
THE WITNESS: Sure. Okay. Thanks.
BY MR. WILNER:
Q. Now, these are actually hearings that occurred on false and misleading advertising for filter-tip cigarettes before the Blatnik committee; right?
A. Yeah.
Q. And, in fact, you talked about some of these hearings yesterday.
A. Yeah.
Q. All right. And so that when they called this hearing together, the first person that they asked to speak was E.

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Cuyler Hammond, director of statistical research, American Cancer Society. Right?
A. Right.
Q. He was the first person called before the committee, wasn't he?
A. Yes.
Q. So evidently he was considered to be a pretty important guy. And this study was considered to be pretty important.
A. Yes.
Q. So he goes on, and I'll talk about total mortality in a minute. But let's just talk about carcinoma of the lung over here.
MR. SHEFFLER: That's page 12, isn't it?
BY MR. WILNER:
Q. Death rates. Page 16.
A. 16. All right.
MR. SHEFFLER: If he -- I object. I think all reported lung cancer is on page 12.
MR. WILNER: Counsel, if I can conduct my examination. I'm doing the best I can. This says, "Age Standardized Death Rates, Carcinoma of Lung." Page 16.
MR. SHEFFLER: Okay.
MR. WILNER: You can call up whatever else you want. There's lots of graphs.
BY MR. WILNER:

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Q. Do you see what I'm looking at?
A. Yes.
Q. Okay. Let's read what it says. "Age Standardized Death Rates. Carcinoma of Lung. (All reported)."
And do you see along the bottom of this chart, they give different categories: Never smoked, ex-smoking, ex-regular cigarette smoker, none, and occasional, less than one-half pack, one-half to one pack, one to two packs, and over two packs. Do you see that?
A. Yes.
Q. So your understanding is that based on this forward study where they went out and they didn't know who would get cancer, but they reported who smoked and how much and they did it for 187,000, give or take a few people, and they followed this up -- and this was near the end of the study in '57, but will you agree with me the results were not different in 1954?
A. Right.
Q. They found that the rates of lung cancer for a nonsmoker, this bar is 12, and I think it's per hundred thousand man years, and the rates for a two-plus pack a day is 264. Did I read that right?
A. Yeah.
Q. And the difference between 12 and 264 is considered the relative risk; right?
A. Yes.

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Q. And it's not exactly 2,000 percent, but it's not terribly far off.
A. Right.
Q. It's actually a little more than 2,000 percent; right?
A. Right.
Q. Now, what was the criticism of this result to the effect that it did not indicate, if someone felt that way, that lung cancer follows cigarette smoking?
A. The main -- well, first, there is again a bias concern, and this is kind of what Croninger was getting at. But Berkson and Donald Mainland and others articulated more clearly that the way this study worked, you know, in essence, was that Hammond relied on local volunteers, women who were active in the local chapters of the American Cancer Society in various communities around the country to gather up -- I believe it was ten men whom they would be able to keep track of for the next several years and to just to check in whether they're alive or dead along the way, and if they die, to report the cause of death.

Now, these women understood to a large extent that this study was about showing a link or trying to -- between smoking and lung cancer, and a lot of them, being active in the American Cancer Society, were particularly concerned about lung cancer. There was a concern among critics of these studies that there was an opportunity for bias among the volunteer

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women in the men that they selected, for example, that, you know, they knew that this study, these nice doctors were trying to show a link between smoking and lung cancer, and they might be able to help them with this guy that they knew who was a heavy smoker and not very healthy. That might be a good subject for them to choose for this study. And they also knew some guys who were not smokers and really in good health, and that might really help these scientists with their project if they could find subjects like that, as opposed to just going out and randomly selecting ten men that they knew. So that was a concern over bias.

And then there was also a different type of concern over the -- expressed about the extent to which the participants in these studies were not randomly -- everyone agreed, to back up, that the best type of study would be to choose, say, a hundred thousand adolescents, and by some means, random means, to divide these hundred thousand into two groups: One, at 50,000, would be required to smoke for the next 20 years. The other 50,000 would not be allowed to smoke for the next 50 years, that that would be the best way to do it.

Q. So, in other words, some people said that the only way to do a study is to have people and make them smoke, one group, and keep the other ones from smoking. And, of course, that's not ethical.

A. Right.

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Q. So in order to get -- if the Hammond/Horn study -- let me put it this way: If there had been no signal -- remember we talked about signal, the signal in the data. Without a signal, if cigarettes were not contributing or causing lung cancer, then Hammond and Horn would look like this [indicating], and that's meant to be flat, or relatively flat. It wouldn't matter how much you smoked how likely you are to get lung cancer; right?
A. Right.
Q. That would be the negative result. But instead of that, we had this, and the probability -- you know what the P value would be or the probability value for that kind of result occurring by chance?
A. No.
Q. Huge, wouldn't it be?
A. Yeah.
Q. Insanely huge; right? Billion to one?
A. But there were those who were concerned that the study was flawed at the outset because of this lack of randomization, and the whole -- all the laws of probability are built upon the idea that you have a subject pool that's randomly selected. And so there were serious scientists who argued that people who chose to smoke -- and this is called a constitutional hypothesis, often -- that people who chose to smoke also were somehow by nature less healthy.

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Q. And they also by some nature got lung cancer, but the lung cancer was not related to the smoking. That's the constitutional hypothesis.
A. Right, right.
Q. Okay. And so the constitutional hypothesis advocated by C. C. Little of the Tobacco Industry Research Committee, that's where that came from; right?
A. Joseph Berkson, head biostatistician at the Mayo Clinic; Jacob Yerushalmy, biostatistician at the University of California School of Medicine, published in the Journal of Chronic Diseases in July 1959; George Saiger, a professor of epidemiology at Columbia University School of Medicine, published in, let's see, JAMA, June 11, 1960 --
Q. Took the position that the constitutional hypothesis was valid?
A. Yes. Should I read it?
Q. Sure.
A. Let's see where to begin. Let's see.
"An element of selection also may be present in studies on smoking and lung cancer, and the fact that they occasionally bear the label prospective," in quotes, "does not make them immune to this sort of bias. For example, it is conceivable that a person's preference for smoking is determined to a large extent by his health habits in general. These habits also may govern his susceptibility to respiratory illness, and

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respiratory illness in turn may predispose a person to cancer. Indeed, there is evidence to suggest that pulmonary infections are rather important in the etiology of lung cancer, decidedly important enough to be investigated more thoroughly. Obviously, in order to establish a cause and effect relationship, it would be necessary to eliminate any possibility of selection. One way to eliminate selection in studies on smoking and lung cancer is to start with adolescents before they develop the smoking habit. These adolescents must be divided into two groups, either by a random process or by careful matching. One group must then be persuaded to smoke heavily and the other not at all. After these groups are studied for a considerable portion of a life span in a controlled environment, the incidence of lung cancer in each group can be compared. It is hard to visualize how such a study might be carried out because of ethical reasons and the difficulty of maintaining long-term cooperation. Therefore, the problem of whether or not tobacco is a cause of lung cancer must remain with us for some time, notwithstanding a recent official report to the contrary."

Just to tie this into what I was talking about yesterday, there was that letter that I read to you --

Q. Doctor, I think you're arguing.

A. All right.

Q. I think you answered that question.

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MR. SHEFFLER: Can we get the date and article for that that he was quoting? I mean, since it's --
THE COURT: All right. We need to have the date of the article that you read from.
THE WITNESS: Sure. It's June 11, 1960. The title is "Errors of Medical Studies." The author is George L. Saiger, S-a-i-g-e-r, and it appears in JAMA, the Journal of the American Medical Association.
BY MR. WILNER:
Q. But there's no study here. There's no counter study that showed that Hammond and Horn was wrong; right? This is just -- this man is flipping his opinion out there; right?
A. Well, he's a professor of epidemiology at Columbia University, so --
Q. So he's flipping his opinion; right?
A. It's --
MR. SHEFFLER: I object to the flipping.
THE COURT: Well -- overruled.
THE WITNESS: I don't -- the characterization of flipping seems problematic to me. But he's offering his considered judgment.
BY MR. WILNER:
Q. And his considered judgment is, the only way we're ever going to know whether cigarettes cause cancer is if we do an impossible experiment, which we can't do because it's

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unethical?
A. That's what he is saying.
Q. So we can't know. We can never know. That's what the doubters say. We can never know the answer, no matter what study comes along. There's always something wrong. Isn't that the case?
A. No, that's not the argument I'm making. What I'm saying is, at this time -- I mean, this article, the editors of JAMA decided to publish it. I mean, it's a prestigious journal. That's a prestigious position.
Q. Facts or opinion?
A. It's his judgment as a medical scientist that gets published in a peer reviewed journal.
Q. How much bias -- this bias that keeps creeping in, that everybody's biased, Wynder is biased, Hammond is now biased, everybody is biased, how much bias would it take to cause this result [indicating] to look like this?
A. I --
Q. You'd have to have a bias on every single patient. Right?
A. I don't know. But I can tell you that there was concern with the studies.
Q. Just because somebody said they were concerned, it doesn't matter how reasonable that concern was to you?
A. As a historian, I've got -- I could read you another example from the Journal of Chronic Diseases. There was an

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epidemiologist, Jacob Yerushalmy. He was with the School of Public Health, division of biostatistics, University of California Berkley. These are eminent guys, prominent journals.

Q. And Yerushalmy was a favorite of the Tobacco Industry Research Committee and appeared on their behalf in front of Congress in 1964 to argue that there shouldn't be a warning label; right?

A. I haven't studied that in detail, but I -- and I don't know if he was on their, you know, payroll or whatever, received funding from them in 1959.

Q. Well, if he was on their payroll and received funding, isn't that something that you should know as a historian if you're trying to give us a fair picture?

A. I would be interested to find out if he was. I don't know.

MR. WILNER: Your Honor, it's a good breaking place.

THE COURT: Okay. Let's do. We'll recess for -- until 1:15, if you would. Plan to be back in the courtroom at that time, and don't discuss the case.

(Jury exited the courtroom.)

THE COURT: You can step down, Doctor, if you like.

THE WITNESS: Thank you.

THE COURT: Mr. Crass, Mr. Holt, have y'all got a problem with these exhibits that are going to be offered

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through the next witness or --
MR. CRASS: Mr. Holt lived up to his promise to be a good boy and got back to me. We have no problems. I think all of those will be admitted by stipulation.
THE COURT: Good. All right. Well, I'll just do that when the witness gets on the stand.
MR. CRASS: Your Honor, for purposes of planning for that next witness, can we get a sense about how much longer we'll be with this one?
MR. WILNER: I think I will be done within an hour of the time we resume.
MR. CRASS: Fine.
MR. WILNER: And if I'm not done, I'll be dead, so I may as well plan on being done.
THE COURT: I hope it's the former.
Are you going to have extensive redirect?
MR. SHEFFLER: So far not, your Honor. I'll have some, but it will be probably -- I don't know what he's going to do, but I don't imagine it's going to be too much.
THE COURT: Okay. We'll be in recess until 1:15.
(Recess at 12:06 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: May 17, 2003

Christa R. Newburg, RMR, CRR, CCR
United States Court Reporter

MR. WILNER: If it please the court. Thank you.
BY MR. WILNER:
Q. Mr. Harkness, I hope you had a nice lunch.
A. Yes
Q. I won't be much longer with you, and I appreciate your time here today, sir.
A. Thank you.
Q. The Hammond Horn work of which I have the graph on page 60 of the hearings before the subcommittee, false and misleading advertising relative to cigarettes and which were also -- which are essentially the results reported in 1958 by Hammond and Horn, showed a correlation between cigarette smoking and lung cancer, as we've talked about before, that was huge.
A. Yes.
Q. In fact, it was one of the largest or most powerful correlations that ever were demonstrated in the science of epidemiology.
A. I'm not aware of that, but.
Q. You don't dispute it?
A. No.
Q. Okay. Now, and as we've said before, although the full study was not available until 1958 or actually '57 in these hearings, that preliminary results, which were very similar, were published by Hammond in 1954 and read to the

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American Cancer Society at their meeting?
A. Yes.
Q. Now, I want to show you what's been marked as plaintiff's exhibit 661, which is entitled the Frank statements of cigarette smokers, and this appeared in newspapers all over the country in 1953 -- '54 rather. Do you remember that?
A. Yes.
Q. In fact, you testified about that in your direct examination, did you not?
A. Yes.
Q. And you were asked I think whether it was a true statement at the time whether this number three that says there's no proof. It says, "Medical research of recent years indicates many possible causes of cancer but there's no agreement among the authorities regarding what the cause is, and that there is no proof that cigarette smoking is one of the causes." And you are sticking by those as being true, right?
A. I think reasonable is my testimony yesterday.
Q. Reasonable, okay. Now let's look at four. Now, before I look at four, despite what Dahl and Hill said, despite what Wynder said in 1953, correct, as to number 3, as to proof. Reasonable despite what these people had said who actually did the work?

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A. Right.
Q. Okay. So now let's look at four, that "statistics purporting to link cigarette smoking with a disease could apply with equal force to any one of many other aspects of modern life." Now, was that true?
A. I mean, there were scientists who said that. The other thing in terms of chronology that I think might be worth pointing out, is this came out in January of '54 and the prospective studies were first presented in June of '54.
Q. Thank you for pointing that out, because we're going to go through that. I'm going to ask you that exactly, but let's just focus on what I asked. Was that true?
A. There were scientists in the community who, in the scientific community, who believed it was that way. Even the letter from Wynder to Graham written in June 20, 1950 reports -- has Wynder reporting to Graham that that's essentially what the Surgeon General of the Public Health Service had to say.
Q. Let's move forward. Let's keep that in mind. As of 1957 when one of the most, if not the most, powerful correlations in the history of epidemiology had been published, would it still be true and not misleading to say that statistics like these could apply with equal force to any one of many other aspects of modern life?

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A. I don't know. But, again, the reality is that that Frank statement appeared well before the prospective study.
Q. Mr. Harkness, I asked you whether it was true as of 1957. So then we will go forward and see whether that statement maybe was made again by someone in the cigarette industry after the Frank statement. But just focus on my question.
A. Okay.
Q. It wasn't reasonable in 19 -- after this most power of statistical epidemiological studies nobody could say that the statistics purporting to link lung cancer with smoking -- cigarette smoking with lung cancer could apply with equal force to any one of many other aspects of modern life.
A. I'm not aware of scientists raising those objections. There were other, as we talked about before, criticisms.
Q. Let's stick to the one I'm talking about.
A. Okay.
Q. You just said you were not aware of scientists raising that objection. When you went through the objections before I didn't hear anything like that.
A. Right.
Q. So let's move forward in time. In evidence, 686,

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the American Tobacco Company. This is all the way forward to 1969 and here is what the American Tobacco Company says.
MR. SHEFFLER: Your Honor, may we approach for a second?
THE COURT: All right.
(The following proceedings at the bench)
MR. SHEFFLER: If you recall, Your Honor, you admitted this with limiting instructions. It's evidence as to consumer expectations, not as to failure to warn and that's what he's using it for now. He's using it exactly for what the court limited it to not be used for.
MR. WILNER: Because the defect claim includes a punitive count. We're entitled to show that the manufacturer at the time producing the product up to 1981 is concealing information. This is part of the exception.
MR. SHEFFLER: Your Honor, you ruled on this case and the failure to warn claim as of '69 and this is pre-empted.
THE COURT: I agree. I'm going to sustain the objection.
(End of bench conference)
BY MR. WILNER:
Q. Do you remember when you were telling us about the Sloan-Kettering Institute?
A. Yes.

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Q. And Dr. Wynder, there came a time when Dr. Wynder came to the Sloan-Kettering Institute to do his research there.
A. Yes.
Q. And this was in, well, the early '50s, 1953, 1954?
A. Maybe in '52 I think.
A. The Sloan-Kettering Institute was in New York, right?
A. Still is.
Q. And the American Tobacco Company was also in New York?
A. The headquarters, yes.
Q. Now, I would like you -- are you familiar with a document entitled meeting 9:00 a.m. November 5, 1953, Sloan-Kettering Institute dated 11-17-53 being 2209 from your set?
A. I mean, I have that. 2209 doesn't mean much to me.
Q. I'm identifying that for the record. But you have that document I'm showing you?
A. Yes, I do.
Q. I'd like to ask you a few questions about it. You found this document in the records of American Tobacco?
A. Yeah, on the web site. Shall I dig mine out?
Q. Yes. The people that attended this meeting, there were several from the Sloan-Kettering and then Dr. Hanmer was there and he was from American Tobacco, right?

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A. Right.
Q. And Dr. Rhoads, he was in charge and he was the one that you said, I think it was about a year after this, gave them a notice and said we at Sloan-Kettering, we don't believe it?
A. It was about a month after this.
Q. A month after, okay. So in this meeting, which these notes are written inferentially by Dr. Hanmer of the American Tobacco Company, correct?
A. Yes.
Q. And he goes, and I want to go through this. It's one of the last documents we'll talk about.
A. Okay.
Q. "I handed to the others present copies of the letter to Dr. Miller outlining the company's position with respect to institutional research."
A. Shall we dig that letter out as well or not?
Q. Let's just stay focused.
A. Okay. It's relevant.
Q. Thank you for telling me it's relevant, but if we're going to get out of here today follow through and then you can say whatever you want.
A. All right.
Q. "Outlining the company's position with respect to institutional research. I then told them that we had

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contributed $50,000 a year for the past three years to the Damon Runyan fund." Which is what?
A. Private cancer research fund.
Q. Having something to do with Sloan-Kettering?
A. No.
Q. "Mr. Teeter said it was a great relief to have this knowledge shared by others and asked if he might let it be known to representatives of the industry when soliciting funds for them. I told him I would like for us to discuss this with Mr. Holmes. Teeter remarked that our gift was about 90 percent of the industry's contribution." What does that mean?
A. Teeter was the executive director of the Damon Runyan fund, and I think, how I interpret that, is that American Tobacco's gift of $50,000 a year was about 90 percent of what the tobacco industry, the various tobacco companies, were giving in total to the Damon Runyan fund.
Q. So this is a meeting, and one guy is there from the Damon Runyan fund and Rhoads is there from Sloan-Kettering and they are discussing how they are going to get some money out of American Tobacco, true?
A. They are discussing that they have gotten money from American Tobacco.
Q. Both Sloan-Kettering and the Damon Runyan fund?
A. Yeah. I mean, they are talking about other things

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but.
Q. Okay. Well, anyway, Rhoads says or Hanmer said, "I had a feeling, which was entirely intuitive, that Dr. Rhoads was in effect trying to say that we would have done better to place all of our institutional research contributions with Damon Runyan." So is there, I don't mean to belabor this, but is there a connection between Damon Runyan and Sloan-Kettering?
A. I don't think so. Damon Runyan was providing some funding to Sloan-Kettering.
Q. Okay. So American Tobacco was paying Damon Runyan, this fund, and the fund was funding Sloan-Kettering. Got you. So now let's go on. "Dr. Rhoads handed me a cover letter --
A. What page are we on?
Q. Two. Dr. Rhoads handed me a covering letter" -- this is 1953, correct?
A. Yes.
Q. "Which he had already written addressed to me in Richmond," because Hanmer was in Richmond, right?
A. Yes.
Q. "To which was attached a detailed outline of a program for cancer research which he had written in response to a request" by some other doctor at Bowman Grey school, which was Reynolds. "Dr. Rhoads implied that a

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project such as that would be too large and ambitious for an institution the size of Bowman Grey," which is another place, right?
A. Right.
Q. So they are basically talking about some ambitious program of research and there's -- and here Dr. Rhoads says, well, you know, that other institution isn't going -- it's too big for them, implying that it would be nice to give to us?
A. Right.
Q. So now Mr. Hanmer of the American Tobacco Company continues, and he says, "I told them we were disturbed about some of the activities of the members of the research team. Dr. Rhoads asked who. And I said Dr. Wynder and Dr. Graham." Is that what it says?
A. Yes.
Q. Now, this would be after Dr. Wynder had done all the work, all over the country and collected the cancer cases and published, and it would also be after Dr. Wynder had gone through all these experiments with the mice and published that, right?
A. He hadn't published yet.
Q. Well, they knew about it, didn't they?
A. Yes.
Q. So they knew he was about to publish. And now Mr.

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Hanmer is saying that he is disturbed by Dr. Wynder?
A. Disturbed by Dr. Wynder? I just lost my place.
Q. Paragraph 2. "I told them we were disturbed about some of the activities of the research team. Rhoads said who," who are you disturbed about? "And Hanmer said Wynder and Graham." I thought that immediately after this in the Frank statement that American Tobacco had said that basically they were going to, they wanted to cooperate with all the scientists. They didn't want to shut anybody up. They thought scientific research should go forward.
A. Right. I think it's important to understand that Hanmer had technical problems or disputes with the nature of Wynder and Graham's reserch. More specifically Hanmer thought Wynder had not been very careful in his preparation of tobacco tar. It had been too concentrated and it had been prepared in a rather sloppy fashion. And this is an area in which Hanmer did have some expertise as a scientist himself.
Q. So the answer would be to go and do it yourself, right? Not to go to Wynder's boss and say shut this guy up.
A. I mean, he's just saying he thinks that Hanmer is doing sloppy research, or he thinks Wynder is doing sloppy research, and he really doesn't want his company to be

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funding sloppy research.
Q. Let's see if that's right. "I told," it says, "I told them we were disturbed about some of the activities of members of the research team. Rhoads said who. He said Wynder and Graham. He replied that Wynder," he being Rhoads, that the guy on S. R. I. says "Wynder had nothing to do with the tobacco research, and I reminded him," Hanmer reminded him "that his name appeared as a member of the research team on two of the five projects which we were asked to support, and a third one was in the name of Dr. Graham. Rhoads seemed surprised and looked inquiringly over at Teeter who said that this was true but he thought it would have been a mistake." It was a mistake to include Wynder's name in the outline. Is that what it says?
A. That's what it says.
Q. Wynder and Graham were like the -- they were the spark plugs behind this thing. They were the most renowned. They had published the most powerful papers in the world at that time, right?
A. On the topic of smoking and lung cancer.
Q. And now American Tobacco is going in and saying look, Rhoads, we don't like these guys and Rhoads is saying oh, but basically I didn't even know they were on tobacco and Rhoads didn't know that Wynder was doing tobacco work?

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A. That seems odd to me.
Q. Okay.
A. Important point in here, yes, it was the most powerful looking back at it, but what I want to emphasize is Hanmer had technical reasons, especially with the mouse skin painting stuff, that he wasn't happy with it. He thought there were serious problems with it.
Q. You said it, all right. "Dr. Rhoads said that Wynder actually was working in Memorial Hospital on circumcision, oral cancer, and diet and that he had been deliberately taken off tobacco work." Is that true?
A. I don't know.
Q. Did Rhoads kill Wynder's work because he wanted money from American Tobacco?
A. I don't know.
Q. Well, now, let's -- you say you don't know. You are a historian, and when you did look at some of these other documents and you went through and you said well, I think this shows this, and I think this shows somebody's intent, but now you look at this document and you say I don't know.
A. The thing that's odd about it is Wynder did continue to do tobacco work. It would be interesting to go -- Rhoads' papers might be out at S. K. I. somewhere and it would be interesting to try to track that down.

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Q. At least it shows an intent by American Tobacco to shut up Wynder, doesn't it?
A. I'm not so sure that's what was going on.
Q. Dr. Rhoads said, I'll go on. "I said nevertheless he had appeared," I'm sorry. And then oh, "he had appeared on the American Cancer Society program and the subject was tobacco. Dr. Rhoads said he could explain that." He could explain. And he added, "Please don't confuse us with the American Cancer Society. They are a money raising organization. They encourage dramatics at their meeting and try to appeal to the emotions. We want no part of their kind of program."

So he is saying oh, well, you know, if you saw Wynder on the American Cancer Society, remember, they are just a bunch of dramatic people, we don't do that. That's what he's saying, right?
A. That's what he's saying.
Q. He's still trying to get the money out of American Tobacco, right?
A. I'm not sure what's going on.
Q. You are not sure? Really? Are you as sure as you were when you did all that other historical work about what was in people's minds?
A. Yeah, there's some questions in my mind what's going on here.

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Q. Okay. "As to Wynder," as to Wynder, "he had spoken to Dr. Rhoads about accepting the invitation to appear on the American Cancer Society. Rhoads had advised against it but Wynder accepted. Rhoads commented that though he control Wynder's work and his publications, Wynder was a free agent and he had no control over his activity outside the institute."
A. Right.
Q. Do you see that?
A. I do. Again, I think it's possible that Rhoads had, you know, genuine concerns with the quality of Wynder's research work as expressed in that document I shared with the jury yesterday.
Q. Rhoads just said that he didn't even know Wynder was on tobacco because --
A. He didn't know he was working on it anymore.
Q. Well, here -- right. Because Hanmer says we're disturbed. Hanmer initiated that, didn't he? Rhoads didn't walk in there and say oh, he didn't need to talk to Hanmer about that. If Rhoads didn't like Wynder's work, he would have just taken care of it. But Hanmer walked in there and said we're disturbed. We want this Wynder stuff stopped and you are going to get money.
A. That's a different interpretation than I put on it. Hanmer was concerned about the quality of Wynder's work,

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and he had reason to doubt the quality.
Q. Let me read you one more part of this and we'll move on. Page 3. It's a long paragraph but I want to start somewhere. "I asked them," which is him, Rhoads, right here, halfway down.
A. I then?
Q. "I then asked him how these results." I don't care, I'm trying to find a place to start. "He did not answer but Rhoads interposed and said that he did not expect a direct relationship between mouse carcinogen and human carcinogen." That was a discussion they were having because Hanmer came in and said look, we're going to give you some money to do mouse skin work or mouse work, but I'm worried that, are you going to just keep increasing the concentration until you get positive results? And if so, I don't know whether I want to fund that.
A. That was a concern, a genuine scientific concern that Hanmer had, and others had, including Harold Stewart about this mouse skin painting work. The concentrations of the tar had gotten so high that it would produce skin cancer, and it was an argument that you took any organic product, any product from nature, human hair, wood, anything, burned it, and concentrated the tars, the combustion products down to a sufficient concentration and painted it onto mouse skin, that you would get cancer and that Brooks

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actually reported back in one of his meetings in St. Louis, Stanley Brooks, the consultant went out to St. Louis and he talked to Croninger, and Croninger, according to Brooks is saying well, yeah, we have to concentrate the tar to the point it's producing cancer, and Brooks is reporting back saying well, that's the crux of the problem. They are getting so concentrated, they are concentrating it the point where it produces cancer, so circular reasoning.
Q. So the point being that it was Hanmer who was scared of positive results?
A. He wasn't scared of positive results, he thought the results were invalid.
Q. Let me ask you this. If Hanmer were after the scientific truth and not just defending his financial position in the company, then having negative results if they are wrong, would be just as bad as having positive results if they are wrong.
A. You lost me there.
Q. Let me read on. "Hanmer says" or back up here. "I would like to ask a question of Dr. Nelson. Is it not true that the particular project which is now under way at the New York University will have to produce positive results? In other words, will you not increase concentration of the so called cigarette smoke tars to the

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frequency of application until skin cancers are produced?" So he is worried about that?
A. Yeah.
Q. Yeah. And then let me skip on. If this were -- they talk about removing it if they find it. He says, "I want to get this perfectly clear. As I understand it you are saying that mouse carcinogen and cigarette smoke should be removed and that if it is removed" --
A. Where are we?
Q. This is here near the bottom. Hanmer is speaking. He says, "I want to get this perfectly clear. As I understand it you are saying that mouse carcinogen in cigarette smoke should be removed and that if it is removed, our problem will be solved although nobody knows whether there is any relation between mouse carcinogen and the carcinogen which is alleged to cause," cause "lung cancer in man. Dr. Rhoads appeared a bit nettled and said the industry already recognizes the need for its removal because they are making filter tip cigarettes. I said," meaning Hanmer said, "I beg your pardon? The industry is not making filter tip cigarettes. The two largest members of the industry do not have them and filter tip cigarettes were made, not because of the recognition to any hazard to the smoker, but because of publicity emanating from the medical profession linking cigarette smoking with cancer

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which gave some of the smaller companies an opportunity to promote the sale of filter tip cigarettes making use of therapeuting claims. It is purely a merchandising and sales promotion proposition." Did I read that right?
A. Yeah.
Q. So Hanmer told him basically that this filter tip business was just merchandising?
A. That's what Hanmer is saying, yeah.
Q. Okay. Now at the bottom Rhoads says, he refers to the epidemiologic studies, Hammond's survey, this is what's coming.
A. Uh-huh.
Q. And says it was entirely separate and apart from their research program. No one could predict what the results would be and, of course, now we know what the results would be because they came in within a few months of this, right?
A. About seven months later, yeah.
Q. "I told them this meeting had clarified my thinking greatly, and although I could not speak for other representatives of the industry, it would be desirable for Lanza and Rhoads at the meeting scheduled for 10:30 to state their position as much as they had already done so. This would include disavowing the independent statements of Wynder and Graham and a clear definition of their

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attitude towards irresponsible publicity on the subject. It should also include a statement that there was no scientifically established relationship between mouse skin carcinogens and human lung carcinogens." Do you see that?
A. Yes.
Q. Is that what you mean by friendly research?
A. No. Again, going back to the point I've made repeatedly, that Hanmer genuinely believed that the Wynder and Graham mouse skin painting research was problematic. A, they concentrated the tars too much, and he wasn't alone in that concern; and B, that drawing a line between mouse skin carcinogens and human lung carcinogens was a problem.
Q. And he wanted the Sloan-Kettering Institute, in return for getting their money, to make a statement, and the statement must be that there was no scientifically established relationship between mouse skin carcinogen and human lung carcinogen and that was bought and paid for, was it not?
A. He said it would be very desirable and it doesn't seem that conditional to me. Put yourself back. Yeah, we can look back now and say oh, Hanmer knew darn well this research was right and he was just trying to cover it up. I would assert, and I do assert, that Hanmer genuinely believed that the research was sloppy and it didn't mean

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much.
Q. So why did he want the Sloan-Kettering -- what did he care whether the Sloan-Kettering came out with this statement to say, okay, we get our money, yes, we don't believe it?
A. He was concerned that this sloppy research that didn't mean much was getting all sorts of publicity.
Q. Just concerned? You mean as a scientist or he was concerned because it's hurting the sales of his cigarettes?
A. Perhaps both. Not mutually exclusive.
Q. He's just such a scientist he wants to make sure that the Sloan-Kettering, they can't speak for themselves. They wouldn't know how to go up and say their own position. He has to come to them and say you make sure you say it's not cause and effect. They need his help in that?
A. No.
Q. Okay. You said, this is one of the last. You said that you are convinced Dr. Hanmer and the people in American Tobacco, they just didn't know. They weren't actually -- they didn't have this knowledge and were concealing it to, you know, to sell more cigarettes but they just didn't know, right?
A. Say it again. The questions get hard to follow when

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they are so long.
Q. The reason they didn't do anything about it is they didn't know. That's been your thesis, right? Hanmer didn't know.
A. That he had serious concerns about the quality of the scientific evidence.
Q. More than that. You can have concerns and still think that, you know, the sum total of all the stuff subject to my concern indicates there may be a problem out here. You are saying he was just completely blank?
A. He was aware of what was going on. I read the letter yesterday from June of 1959 to his colleague John Hager, a long letter laying out the pros and cons, and in the end he says look, I just don't think the evidence stacks up.
Q. And he was smoking 50 cigarettes a day when he said it, huh?
A. Right.
Q. So let's investigate this. You said you went on the web and you looked at certain documents, did you not?
A. Yes.
Q. And was there a time when there was a survey conducted, not about people this time, but about the beliefs of people in the cigarette industry to determine whether they really believe that cigarettes didn't cause cancer in 1958?

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A. I'm not aware of that document.
Q. Okay. I show you a document that's been marked as exhibit 377.
MR. SHEFFLER: Your Honor, objection. This is a document that has been objected to and it's not in evidence and I need to take it up at the bar.
THE COURT: Plaintiff's exhibit?
MR. WILNER: 377. Yes, plaintiff's.
(The following proceedings at the bench)
MR. SHEFFLER: If I'm in error, Your Honor, I apologize but I don't think you have received it.
THE COURT: I remember it now.
MR. SHEFFLER: Your Honor --
THE COURT: This is the visit by the British scientists to the United States?
MR. SHEFFLER: Right. Your Honor, I would request when a document has been specifically objected to as prejudicial and not relevant for the reasons we stated, that it not be shown to the jury until you receive it. I mean, I know we've published documents where we have not really objected, but this one we really have a specific objection, and I don't think it's fair for Mr. Wilner to publish it to the jury.
THE COURT: No, that's right.
MR. WILNER: I never did hear the objection.

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What's the objection?

MR. SHEFFLER: It's the same objection we've had before. This is not a document that American Tobacco Company has. It's not a document that any foundation has been laid for as an authentic document, and I don't see how it can be offered.

MR. WILNER: Whether it went to American Tobacco is obviously not the issue here because now we're talking about his credibility and assessing the industry. I don't care whether it went to American Tobacco or not. It comes from the web site of the tobacco industry.

MR. SHEFFLER: It doesn't come from the web site. That's not a web site document and he knows it.

MR. WILNER: You don't have to point to me, Mr. Sheffler.

THE COURT: Shhhhh. Hold on. Don't get into an argument up here.

MR. WILNER: It shows it was.

THE COURT: You can ask the witness if he can recognize the document. If he can, then maybe there's a foundation for it and some relevance, but I mean, otherwise I haven't received it, so it's not appropriate to display it to the jury unless and until he recognizes it. If he doesn't recognize it, then I don't see how it can come in.

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MR. SHEFFLER: And I also add for the record that this is not a web site document and there's no foundation that it is.

MR. WILNER: It bears a sign of litigation.

(End of bench conference).

THE COURT: Go ahead.

BY MR. WILNER:

Q. Mr. Harkness, I'm going to hand you a document in a minute that's called report on visit to U. S. A. and Canada 17th April, 12 May, 1958 by Bentley, Felton and Reed. That's what the cover page says.

A. Okay.

Q. If you would just look at it. Did American Tobacco share that document with you?

A. No.

Q. And have you seen that document before?

A. Never have.

Q. Are you familiar with the T. R. C. in London?

A. T. R. C., yeah.

Q. They are kind of the equivalent of T. I. R. C. in America?

A. Yes.

Q. And were you aware that the T. R. C. was interested in knowing what the U. S. tobacco industry was doing and thinking in 1958?

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A. No.
Q. Do you think that the T. R. C. contact with the United States is something you would like to research one day in your ongoing project?
A. Perhaps.
Q. Are you interested to know what the position of the U. S. tobacco industry, including American Tobacco, was when it was related to the T. R. C?
A. As represented in this document?
Q. Yes, sir.
A. Sure.
Q. Okay. Do you want to tell us what it is?
A. Oh, I don't know. Do you want to give me some help or do you want me to sit here and read the whole thing?
Q. Take a look on page 2. What does it say?
A. There's an introduction heading and a causation of lung cancer heading.
Q. Why don't we go to the causation of lung cancer.
A. Shall I just read?
Q. Sure.
A. "With one exception," in parenthesis H. S N. Green, that's a Yale researcher I know or am I'm familiar with, "the individuals whom we met believe that smoking causes lung cancer if by causation we mean any chain of events which leads finally to lung cancer and which involves

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smoking as an indispensable link."
Q. Is that a fair definition of cause, leads to it, involves smoking as an indispensable link?
A. It's a reasonable definition of cause, yeah.
Q. So they said with one exception all the people believe it that they saw, right?
A. That's their report it seems, yes.
Q. Flip up to where it says who they saw.
A. Where do I find that?
Q. Previous page they give a list. Who is the first company on the list?
A. American Tobacco Company.
Q. And who do they see? Who are the people listed there?
A. Hanmer, Harlin and Harlow.
Q. Harlow is the guy that we saw in that 1953 paper, right?
A. Right.
Q. And Hanmer is the one you have been talking about, right?
A. Harlow, wasn't that the '41 paper?
Q. Yeah. And Hanmer is the one you have been talking about?
A. Yeah.
Q. And they say with one exception and it's Harry Green,

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it's not Hanmer.
A. Right.
Q. "The individuals we saw believe that cigarette smoking caused lung cancer."
A. Yes, that's what they say.
Q. Mr. Harkness, I'll just ask you really one more question here. Oh, yeah.
MR. WILNER: Your Honor, it's been marked for identification, so that should suffice.
BY MR. WILNER:
Q. I think you said also that Graham, you showed a picture of Graham yesterday and you said that, you know, Dr. Graham really was a great -- the grand old man, I think you used that word, of lung cancer or rather lung surgery. He was really the first one who did a successful pleuropneumonectomy, which is a successful removal of a whole lung from a human being and the man lived. And Dr. Graham was the first man in the history of the world to do that.
A. Yes.
Q. That's quite an achievement, isn't it, when you think about it?
A. Yes.
Q. And Graham sort of adopted Wynder and became his champion in this fight that Wynder had, right?

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A. Yes.
Q. And you are, I'm sure, aware of one of the final letters that Graham wrote?
A. Yes. I think I know the one you are referring to.
Q. I want to put it on. It's D-02747 and he's writing Wynder and he says, "I suppose you have heard by this time from one source or another" --

A JUROR: The monitors are off.

THE WITNESS: I think we're back.

BY MR. WILNER:
Q. "I suppose you've heard by this time from one source or another about the irony that fate has played on me. I think I told you a little while ago that I seem to have picked up a bad flu bug. After going along without any particular progress for about six weeks I decided to come in for an examination. It was found then that I had x ray evidence of bilateral involvement of bronchiogenic carcinoma. An exploratory operation by Tom Burford revealed the spread to a gland. I am now on nitrogen mustard and rather uncomfortable. I was very anxious for you," he's writing to Wynder, "for you to be one of the first ones to know about my illness because of my great interest in you and because of our long and happy cooperation in the enterprise of trying to defeat the enemy who seems to have got the best of me now." Did you

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know that?
A. Yes.
Q. That was one of the most dramatic and incredible stories in the history of lung cancer research, wasn't it?
A. I think that's fair to say.
Q. And finally, I think you talked a little bit about, we talked some about some research from the American Tobacco Company --
MR. SHEFFLER: Your Honor, again, I'm sorry, but I do have to -- I object to this. This has not been received, it's not been offered and I object.
THE COURT: This was not one that Dr. Kyriakoudes displayed?
MR. HOLT: Your Honor --
THE COURT: Let's come up here if we're going to argue about it.
MR. HOLT: I'm not doing this but I did Dr. Kyriakoudes is the reason I'm coming.
(The following proceedings at the bench)
MR. HOLT: We showed it, we talked about it, we didn't make it an exhibit at that time.
MR. SHEFFLER: They may have seen it, Your Honor, but if you are going to cross examine a witness on it and explain to the jury, I would think it would be in evidence or it, I mean, I don't mind them showing it to

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Dr. Kyriakoudes because he's talking about advertisements but now he's trying to cross examine a witness on the state of the art of advertising, and that's not in evidence.

THE COURT: It isn't in evidence but the jury has seen it. Do you want to offer it?

MR. HOLT: I offer it in evidence, Your Honor.

THE COURT: What's the number?

MR. HOLT: I'll have that right for you.

MR. CRASS: If he just wants to show it without making it an exhibit, that's fine.

MR. HOLT: It will be 1194, Your Honor.

THE COURT: I'll receive 1194.

MR. SHEFFLER: Thank you, Your Honor.

(End of bench conference)

(Plaintiff's exhibit 1194 received into evidence)

BY MR. WILNER:

Q. Let me show you an advertisement from the American Tobacco Company. I'm showing you a doctor handing a pack of Lucky Strikes.

A. What is the date approximately on this?

Q. 1931 I think.

A. 1931?

Q. '30 I think.

A. Okay.

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Q. You looked through the research records of the American Tobacco Company, did you not?
A. Yes. Not comprehensively but I looked.
Q. Did you find a study that proved supposedly that 20,679 physicians say Luckies are less irritating?
A. I haven't but I really have not focused on the early 1930s in my research.
Q. Let me show you plaintiff's exhibit number 1189.
THE COURT: Mr. Wilner, we need to take a short recess.
MR. WILNER: This is my last question.
THE COURT: Okay.
BY MR. WILNER:
Q. 1189. This says guard against throat scratch. Do you see that?
A. Yes.
Q. And it says --
A. What's the date on this one approximately?
Q. '52.
A. Okay.
Q. It says, "The further your cigarette filters are smoked through fine tobaccos the milder the smoke becomes and from the very first puff fine tobaccos filter the smoke further than that of any other leading cigarette." Let me ask you specifically did you find anything in

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American Tobacco's records that shows the smoke of Pall Mall guarded against throat scratch?
A. No.
Q. Where did they get this information?
A. I'm not sure.
Q. Well, I mean, you are a historian. You don't know?
A. I don't know.
Q. Okay. And my last question is do you consider that your project has been friendly research for the American Tobacco Company?
A. It's been funded by American Tobacco Company.
Q. Thank you.
THE COURT: We'll recess for 15 or 20 minutes. Do not discuss the case.
(Recess).
THE COURT: Mr. Sheffler, do you have any redirect?
MR. SHEFFLER: I do, Your Honor, briefly.

REDIRECT EXAMINATION

BY MR. SHEFFLER:
Q. Dr. Harkness, I'm going to get you out of here quickly.
A. That's fine.
Q. Just a few questions. I want to kind of follow in reverse order as to what you were asked. First of all,

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you were asked about Dr. Graham. When you were shown this document, you can see here that Dr. Graham, when he did have his surgery, who did the surgery? Can you see on there, the second paragraph.
A. Tom Burford.
Q. Do you know who Tom Burford was from reading the Graham papers?
A. He was another surgeon at Washington University School of Medicine.
Q. Was he working under Dr. Graham?
A. Yes.
Q. Did you know -- let me show you this. This is from an Arkansas newspaper, actually 1966, the Arkansas Gazette. What it shows is the chief expert or chest expert, sorry, chest expert doesn't think cigarettes cause cancer. Who is that?
A. Looks like the same Thomas Burford.
Q. And he was the one who had done the surgery on Dr. Graham?
A. Yes.
Q. And his conclusion, Dr. Burford, was that, "Cancer he said is a very profound biological mystery that is going to require some exceedingly intensive basic research. It isn't going to be a simple affair like smoking cigarettes." Do you see that?

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A. Yes.
Q. "Two of the major reasons for an increase in all kinds of diseases of the malignant and degenerate type in fact are the increasing large population and the increase in the number of all people." Now, was Thomas Burford right when he said that in 1966 about smoking and lung cancer and other cancers?
A. Looking back on it and from now by the standard of today he was wrong.
Q. Was Thomas Burford ignorant about the information that Wynder and Graham had uncovered and had been produced by others during this entire period we've been discussing?
A. I expect not.
Q. You were shown a document that was marked for identification as, I think it was marked 377, and I would like to go over that with you again if I may.
MR. SHEFFLER: Your Honor, may I approach?
THE COURT: Yes.
BY MR. SHEFFLER:
Q. You were asked, Doctor, if you had ever seen that document before and you said you hadn't, right?
A. Correct.
Q. But you were asked if it would be interesting to you to look into the issue about what the T. R. C. or the Tobacco Research Council in London, England thought or had

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to say about their visits to America.
A. Yes.
Q. And that was in 1958. That's the whole point of this.
A. Yes.
Q. I think you told us, Doctor, that it would be interesting, that you would like to investigate it, but you haven't investigated it, right?
A. Correct.
Q. So you don't know really any more than looking at that document what was said or not said, right?
A. Right.
Q. As a historian you would want to know the whole picture I take it?
A. Yup.
Q. You would like to know if there are any other documents that suggested maybe what was said in that document wasn't the whole story?
A. Sure.
Q. As Paul Harvey used to say, let's hear the whole story, right?
A. The rest of the story.
Q. Thank you, Doctor. I got it wrong. But in any event, if you were to find the rest of the story, one of the things you would like to know was, was there any

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confirmatory memoranda of meetings at that time with these people Bentley, Felton and Reed, right? You would want to know that as a historian?
A. Sure.
Q. Because if you looked at it and you found maybe these guys weren't giving us an accurate picture of what was being told to them, that would have an influence on how you viewed that document and what it says. Is that a fair statement?
A. Yeah, of course.
Q. All right. In any event, I've given you another document. If you would just pick it up. We're going to have that marked for identification as D-28, I think it's 2812.
MR. CRASS: 21.
THE WITNESS: 2821 it says on the bottom, D-02821.
BY MR. SHEFFLER:
Q. And that is a report of a meeting of the Scientific Advisory Board New York, New York May 10 to 11, 1958. Do you see that?
A. Yes.
Q. Now, turn to what the plaintiffs have marked as the trip report of 1958. Do you see that?
A. The trip -- the report on the visit to U. S. A. and

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Canada?
A. Right. We'll call that, just so -- this is a report of the trip of the T. R. C. people.
A. Okay.
Q. Look at page 2.
A. Of the trip report?
Q. Right. You see they went to see the T. I. R. C. on what date, the S. A. B, next to the last line.
A. The 10th of May.
Q. So this would be part of the story. They went to see the S. A. B. on the 10th of May, right? And then they are reporting on their trip of which that was part, correct?
A. Right.
Q. Now, let's compare what they say they heard and what the S. A. B. reports they said, okay? Let's compare those two things. Would that be important for an historian to do?
A. Sure. Yes.
Q. Plaintiff's lawyer showed you under causation the sentence that said with one exception, one exception, H. S. N. Green, "the individuals who we met with believe that smoking causes lung cancer if by causation" and they went on to explain what they meant.
A. Uh-huh.
Q. So one person, H. S. Green. Now, at the meeting

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where these three guys were reporting on and said nobody disagreed, what did Jacobson ask Bentley, the last paragraph?
A. Should I read it?
Q. Let's set the scene. Bentley, Feldman, Reed, this is their trip. So they go to the S. A. B. The T. I. R. C. S. A. B., right?
A. Right.
Q. What is the S. A. B?
A. The Scientific Advisory Board, which was part of the T. I. R. C. and the Scientific Advisory Board was made up of scientists from around the country who periodically get together.
Q. And the Scientific Advisory Board got together with Bentley, Feldman and Reed on May 10th as the trip report says, right?
A. Right.
Q. This is a memorandum which we've marked for identification as D-2821 which is a report of that meeting, right?
A. Right.
Q. Can you read that paragraph, Doctor, and tell us what happened?
A. "Jacobson," who was a member of the Scientific Advisory Board, I know that, "asked Bentley point blank if

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he accepted the conclusions of the M. R. C.," the Medical Research Council, which is a British Medical Research Council.
Q. In 1958 what were those conclusions?
A. That smoking caused lung cancer.
Q. Continue.
A. "After long hesitation he said no."
Q. Who is the he talking there?
A. He, Bentley.
Q. So Bentley, the guy who wrote this memorandum, is telling Jacobson after long hesitation, no, he didn't believe smoking caused lung cancer?
A. Right.
Q. Go on.
A. "Jacobson said he was glad to hear that. He personally did not think there was any relation between smoking and lung cancer. But if this hypothesis were generally accepted and it was felt that a case had been proved against tobacco, then he had things to do other than serve on the S. A. B."
Q. And at this time Jacobson was on the S. A. B.
A. Yes.
Q. Doctor, why wasn't this in the trip report? They said only one guy, H. S. N. Green. Jacobson said no, he didn't believe smoking caused lung cancer. Why wasn't it

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in the trip report?
A. I don't know. It contradicts the trip report, my examination of it.
Q. What would you do as a historian when you had two contradictory pieces of information like this?
A. Dig deeper and try to find more information, but certainly it casts doubt on the overall validity or veracity of this trip report.
Q. Thank you very much. Now, let's go on to the next document, this meeting with Sloan-Kettering. Now, at the break did you show me some documents that surrounded this meeting with respect to certain publicity that Ernst Wynder was engaging in at the time?
A. Yes.
Q. Tell us generally what was the set-up, what was the context, what were they talking about that was happening with Ernst Wynder and his mouse skin painting publicity that led to all this.
A. Hanmer wrote a letter to Rhoads at Sloan-Kettering afterwards expressing frustration that Wynder was being so forceful in his public statements that were carried in the press about the force of the evidence linking smoking with lung cancer through the mouse skin painting studies, and then Hanmer was pointing out to Rhoads that when Hanmer had an opportunity to read Wynder's published scientific

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reports, as opposed to the messages in the press, the coverage in the press, the scientific journal reports were much less forceful and more sort of equivocating saying well, it isn't absolute proof that smoking causes lung cancer, that sort of thing, in the scientific literature.
Q. Doctor, in the scientific literature before the Frank statement was written, did Wynder himself ever use the word cause to describe the relationship between smoking and lung cancer?
A. I don't think he did. And there's a piece that Wynder published five, ten years ago, reflecting on his career in lung cancer research, and he specifically says in that paper that he didn't use the word cause in any of his published statements on smoking and lung cancer until after 1954.
Q. I'm going to show you, Doctor, just a few things about this Frank statement that you were shown. I think that was the next back in line. And you were shown the paragraph 4 that was highlighted there?
A. Yes.
Q. Now, this is, again, this statement was signed by a number of heads of tobacco companies, including Paul Hahn, right? Paul Hahn wasn't saying -- it wasn't actually Paul Hahn who said that statistics reporting to link cigarett smoking with disease could apply with equal force to any

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one of many other aspects of modern life. That really wasn't what Paul Hahn himself determined, was it? I mean, let me take that question back. Was Paul Hahn saying others were saying this at this time?
A. Yes.
Q. Okay. This wasn't based upon his research?
A. Right.
Q. Paul Hahn wasn't a statistician?
A. Right.
Q. What was he?
A. A lawyer.
Q. We know lawyers aren't statisticians, don't we?
A. I guess.
Q. "Indeed the validity of the statistics themselves is questioned by numerous scientists," right?
A. Right.
Q. And that's what it says down here at the bottom. "Indeed the validity of the statistics themselves is questioned by numerous scientists." This was written in 19 -- well, it was published in January 4, 1954, right?
A. Right.
Q. Now, what does it say up here?
A. "Distinguished authorities point out."
Q. Okay. Now, let's talk about those distinguished authorities. First of all, you were shown a number of

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papers I think that dealt with prospective studies, and I don't know that there ever was a determination of what's a prospective and what's a retrospective study. In 15 words or less can you tell us the difference?
A. Retrospective study is, as the name applies, looking backward, interviewing patients about their past history. Prospective studies are following healthy people forward until they get sick.
Q. Now, the leading retrospective study, I think we've heard an awful lot about, was Wynder and Graham?
A. Yes.
Q. Would a distinguished authority, looking at that study and reviewing that study, be the Surgeon General of the United States?
A. Yes.
Q. So if the Surgeon General of the United States felt that that study, indeed even the validity of that study was questioned, he would be a distinguished authority, wouldn't he?
A. Yes.
Q. Do you know who the surgeon general was during this time period?
A. Leonard Scheele?
A. We talked about him yesterday, but I want to make sure the jury understands one thing about this JAMA

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article by Wynder and Leonard Scheele's view of it. So I'm going to put up exhibit D-02703 again. I want to direct your attention just to the commentary by Wynder about Leonard Scheele with respect to Leonard Scheele, the Surgeon General of the United States, views of his study. What did Leonard Scheele say about Wynder's study?
A. Shall I read it?
Q. Read it or tell us, whatever you want.
A. "This all started when I asked Scheele whether he had read the article in the JAMA. He said he had read it. He added quickly, however, that this article had not proved anything." It goes on, "He said the same correlation could be drawn to the intake of milk."
Q. Now, distinguished authorities, Surgeon General of the United States. The statistics purporting to link cigarette smoking with disease could apply with equal force to any one of many other aspects." Is drinking milk another aspect of modern life?
A. Yes.
Q. Well, in the interest of time, let me just jump to 1962.
A. Okay.
Q. '61, excuse me, Doctor. You are familiar with the New England Journal of Medicine?
A. Yes.

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Q. That's a journal that was, very early on, on the side of those saying smoking causes lung cancer, correct?
A. In general, yes.
Q. And you are familiar with the editorials that that journal had produced over the years about the fact that they were strongly, strongly of the view that smoking was associated with lung cancer and also that the tobacco industry was not doing the right thing in this whole debate. Do you remember that? Have you seen those?
A. Yes, I've seen those articles.
Q. Was the editors of the New England Journal critical, not only of the tobacco industry, but also of the idea that tobacco was not proven to be the cause of smoking?
A. Yes.
Q. But in 1961 the editorial staff of the New England Journal of Medicine, even with all this, even being on the side of the proponent, what did they do? What did they write?
A. I think you are referring to they published two articles, one by Wynder and one by C. C. Littles in series and they had a preparatory section where the editors set it up and they titled that preparatory section "The Great Debate."
Q. Is this the article?
A. Yes.

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Q. This is entitled, the journal, New England Journal of Medicine, dated June 15, 1961 and it's called, "The Great Debate."
A. Yes.
Q. C. C. Little was who?
A. Well, he was, at this point, he was the retired head of the Jackson lab of Bar Harbor, Maine where Wynder and and Croninger are trained, and he was also head of this, executive director or the director of the Scientific Advisory Board of the T. I. R. C.
Q. These two people wrote different studies or wrote different articles reviewing the evidence in smoking and lung cancer at that time, right?
A. Yes.
Q. What I want to do is just go through the editorial and just see what the editor said.
A. Okay.
Q. Would you read that first highlighted portion?
A. "Both the authors are dedicated, sincere proponents of their points of view, each upholding what he believes to be the truth and nothing but the truth, each ready to admit that the whole truth has not yet been revealed to aspiring man."
Q. To aspiring man? What does that mean?
A. Well, to scientists searching for the truth.

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Q. What do we have next?
A. "It is enough to say that most of the evidence is statistical and demonstrates a close association between heavy cigarette smoking and lung cancer. However, it is generally believed that statistics in the hands of a master can be made to prove almost anything. Many conscientious observers believe that there are strong indications in favor of a causal relation in the vast majority of cases and no acceptable evidence that disproves it. Others remain unconvinced or have taken a determined stand behind Dr. Little."
Skipping down, "Each individual must choose his own course, whether to woo the lady nicotine or adjure the filthy weed while the search for the truth continues."
Q. 1961. Doctor, as a medical historian, as a scientist looking back, how or, question, is it important for you to consider what the New England Journal of Medicine said, and its editorial staff said about the debate between the scientists in 1961? Is it important for you to consider the fact of the bias of the editorial staff about the debate at that time?
A. Yes.
Q. How? Why?
A. Well, the editorial staff in general, as they showed in earlier pieces, were inclined toward the idea that

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smoking caused lung cancer. But at the same time this piece we just read from suggests that they still, although they held these beliefs, understood that others of good faith and good intentions held different views.

Q. And that great debate was resolved when, Doctor?

A. To a large extent, as I argued yesterday, with the publication of the Surgeon General's advisory committee report in early 1964.

MR. SHEFFLER: Thank you, Your Honor.

MR. WILNER: Just a few more questions.

RECROSS EXAMINATION

BY MR. WILNER:

Q. You got the document about the visit to America. You never saw it before I handed it to you, right?

A. Right.

Q. And you got another document from Mr. Sheffler and neither one of those you had ever seen before, right?

A. Correct.

Q. But the documents do relate to one another in that there was a visit, right?

A. Correct.

Q. According to the second one. And one of them says everyone denied, or nobody denied it but Harry Green. And in fact it also says, whose views are nowhere thought to be sound. Doesn't it say that?

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A. I didn't read that part.
Q. Do you want to see it? I don't want you to suggest that I'm not reading it right. Whose views are nowhere thought to be sound. If the trip document omitted somebody from the Scientific Advisory Board, you don't know which document is in error or whether that has anything to do with Mr. Hanmer, who was the subject of our attention, do you?
A. No. There is a degree of specificity about this story of Jacobson asked Bentley and Bentley after a long pause. There's a ring of truth about it, because it's such a specific rendering of the story.
Q. And there's a ring of truth about the visit, right?
A. That's a much more general assessment.
Q. Have you ever got any documents from Mr. Hanmer on this visit?
A. No. I didn't know about the visit before this afternoon.
Q. You were asked about the New England Journal of Medicine, and I want to show to you, since you just read part of an editorial, I want to conclude with this if I might. This is an editorial from the New England Journal of Medicine and it's dated 1960. I'm going to begin, I apologize much for the copy, but it's the best one I've got. And says, "It is over 20 years since doctors Lombard

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and Dering in these pages first suggested an association between smoking and cancer. Since that time there have been over two score similar studies." Like a score, that's a unit of measure, a number?
A. 20.
Q. The number is 20, right? So two score would be 40, is that right?
A. Sounds right to me.
Q. Two score similar studies all, and the all is in italics, all of which have shown the same association and have progressively implicated excessive cigarette smoking. No responsible observer can deny this association, and the evidence is now sufficiently strong to suggest a cause. And in the face of this evidence the response of tobacco manufacturers and their spokesmen has been deplorable. They have distorted the facts beyond recognition."
And then on the bottom I'm going to ask you now, "It is not necessary to have precise information on etiology." What is etiology?
A. Causation. Could you slide it.
Q. "To prevent disease. Vaccination protected against small pox more than a hundred years before the virus was identified and the cholera vibrio was unsuspected at the time that John Snow had the foresight and courage to take

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the handle off the Broad Street pump" and you know about that story, don't you?
A. Yeah, I do. It's kind of a legend in public health that historians have sort of dispelled as being somewhat untrue. If you want, I can tell you a little bit more about the actual history of John Snow if you would like.
Q. The concept is what I was after.
A. Okay. Rather than the history.
Q. Yeah. He took the pump off, he saved the people, he didn't have to know. But it was a practical control method.
A. But the history of it is that he did not convince his colleagues.
Q. Sort of like Wynder, huh?
A. Very much so.
Q. "Lives will continue to be lost if control measures must await definitive studies. Lives would be saved if physicians can now persuade their patients to stop smoking." Do you agree this is part of medical history as well, sir?
A. Sure.

MR. WILNER: No further questions.
THE COURT: Mr. Sheffler?
MR. SHEFFLER: No, Your Honor.
THE COURT: Mr. Harkness, you may step down.

Pegge J. Merkel, RMR
United States Court Reporter

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Call your next witness.

MR. CRASS: Your Honor, the defendants would call Dr. David Sansing.

(David Sansing, called by the defendant, sworn)

MR. CRASS: Your Honor, while Prof. Sansing is taking his seat, would it be a good time to put into the record the exhibits that will be received?

THE COURT: Yes.

MR. CRASS: Your Honor, I believe by stipulation the parties have agreed that the following defendant's exhibits will be received: 645, 761 to 764, 786 to 887, which are Reader's Digest articles; 898 to 999, which are Time Magazine articles; 1010 to 1019 Business Week articles; 1024, 1155 to 1827. Those are Gazette and Democrat articles; 1832, 1945, 1979, 2013 to 2023, 2024 to 2105, 2154 to 2170, 2189, 2622 to 2624, 2627 to 2631, 2633 to 2689 and 2694 to 2696. I believe we've agreed those are admitted by stipulation.

(Above defendant's exhibits received)

MR. HOLT: Your Honor, that is correct, but one other thing. The document that was just handed over, I want to make sure that it's noted and offered and accepted also.

THE COURT: What's the number?

MR. HOLT: The trip to the U. S. A.

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MR. SHEFFLER: Can we tackle that at another time?

THE COURT: Let's take that up a little later. I don't believe it was offered during the other witness's testimony, but we'll take it up at the end of the day.

MR. HOLT: All right, sir.

THE COURT: I will receive those exhibits.

MR. CRASS: Your Honor, we also talked, Mr. Holt and I did, earlier in the testimony we had three exhibits which we marked only for identification. That would be 2819, 2818 and 2820 which are replicas of the Democrat and Gazette newspapers. I believe Mr. Holt is prepared to stipulate that they may be received. They were previously marked for identification.

MR. HOLT: Your Honor, I have agreed to that on the agreement that all the newspaper articles that he pulled out are entered, and these are part of that.

THE COURT: Okay. I'll receive 2818, 2819 and 2820.

(Defendant's exhibits 2818 through 2820 received into evidence)

MR. CRASS: Your Honor, the documents that I read out earlier, we have compiled a copy for the court. Here is a box. I don't intend to have Mr. Sansing go through all of them, but we may use some.

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THE COURT: All right.

DIRECT EXAMINATION

BY MR. CRASS:

Q. If you would, state your name, please, sir.

A. My name is David Sansing.

Q. Sir, are you a professor?

A. I'm a professor emeritus.

Q. What does that mean?

A. That means I don't get paid. I retired in 1995 and was given the title of professor emeritus.

Q. What were you a professor of during that period?

A. I was a professor of history.

Q. Do you consider yourself a historian?

A. Yes.

Q. All right. The jury has already heard from two historians, so we're not going to go through all the details of what historians do, I'm sure everybody will be glad to know, but let me ask a little more about you. Where did you grow up?

A. I was born in Greenville, Mississippi, grew up there. Went into the Army in 1951. After I got out of the Army I went to Mississippi College, got a bachelors degree, and went to New Orleans Baptist seminary for a year, but I decided rather than to be a Baptist minister I would prefer to be a college professor.

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I went back to Mississippi College to get a masters degree. I taught for ten years at a community college on the Mississippi gulf coast, and then enrolled in a Ph.D. program at the University of Southern Mississippi. Got my Ph.D. in 1969, and in 1970 I was appointed Assistant Professor of History at the University of Mississippi.

Q. Okay. And how long did you teach at the University of Mississippi?

A. Well, technically I'm still a teacher. I still serve on graduate student committees; I read dissertations. So from 1970 until the present I'm considered a faculty member of the University of Mississippi.

Q. I take it that this isn't your first trip to Arkansas?

A. No.

Q. Did you have any family in Arkansas?

A. Yes. I would have been born in Arkansas except that during the depression my father got a job in Mississippi. He worked on the levee in 1929. All of my brothers and sisters were born here. My mother and father are buried here in Arkansas.

I have two of my siblings, two sisters were born here, I'm sorry, were born and buried here.

Q. And you have been at the University of Mississippi.

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Is there a particular area of history that you have specialized in?
A. I specialized in southern history and state history of Mississippi.
Q. Have you published any articles in the history area?
A. Yes.
Q. How many, sir?
A. Articles and lectures, maybe 200.
Q. Have you written any books?
A. Yes.
Q. How many books?
A. Counting the good ones and the bad ones and the short ones and the long ones, 15.
Q. And have you given lectures, other than at the University of Mississippi, on the subject of history?
A. Yeah, I like to lecture. That's one of my favorite things to do.
Q. We have in evidence now through this stipulation, Professor, your resume. Professors call them curriculum vitae but resume or biography, and that will be in evidence for the jury to see. But have there been places that you lectured, for example, I see for some reason you went to Paris and lectured. What was that about?
A. I had done a paper on a great African-American diva, Elizabeth Taylor Greenfield. She was to the 1850s what

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Leontyne Price is to our day, and I did this lecture at Natchez and a professor from the University of Paris, Michelle Farbe, was there and heard the lecture and mentioned to me that we are having at the University of Paris next spring a collection of lectures about African-Americans who spent time in Europe. Elizabeth Taylor Greenfield had gone to Europe to study, and he invited me to give that lecture that he heard at the University of Paris.
Q. What's the most recent book that you have written?
A. After I retired, one of the reasons I retired early, was to do a history of the University of Mississippi.
Q. Was that for the 150th anniversary?
A. Yes. Ole Miss is 150 years old and the chancellor asked me to write that book and he didn't give me enough time. So I said, Chancellor, I'll have to retire. I can't teach and do this. He said go ahead and retire and we'll pay your regular salary to do that book.
Q. Do you have any works currently in progress even in retirement?
A. I'm in the very early stages of a biography of L. Q. C. Lamar who is a member of the United States Supreme Court. And also, I'm very nervous, on June 3, Mississippi is celebrating the centennial anniversary of the state capitol. We moved into it in June of 1903 and the

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legislature as proclaimed a celebration for that, and Gov. Winter was supposed to make the principal address but Gov. Winter for some reason had a conflict and could not do it, and the legislative committee asked me to do the principal address for that centennial celebration, which is in about 13 or 14 days.
Q. Okay.
A. So, I'm going to talk real fast.
Q. Assuming we get through here. Professor, I suspect you will be asked some questions that will try to imply that there are biases here. I want to try to get one out of the way real quick. You and I have talked about this. Do you know who played the longest foodball game in the history of college football?
A. Not only do I know, I was there.
Q. Who were the two teams?
A. University of Arkansas, the University of Mississippi. We've already talked about this. Of course, Ole Miss got beat.
Q. I won't ask you who you rooted for, I was just going to ask you who won.
A. I don't know why you bring this back up, especially with me being under oath.
Q. We'll move on. That was the seven overtime game and you sat through all seven, didn't you?

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A. I think it will never be excelled. I think it's one of these classic games that that record will never be broken.
Q. Of course, there was a game in the history of those schools where they still argue about whether a field goal was good and who won, right?
A. That's correct.
Q. Let's move on to things in this case, Professor, and again, I'm not going to go through all the background of what a historian does. But just tell us, if you would, what role does hindsight play? Hindsight, we all know what hindsight is. What role does hindsight play in the study of history?
A. The one thing that a good historian does is he does not interpret the past in light of the present. He interprets the present in light of the past. Sometimes, as I have said before, sometimes to really understand a situation in a historical context, you almost have to forget what you know now, and I like to use the prohibition era.

Looking back at the prohibition era we are sometimes amused that those ladies were so dedicated to going into the saloons and breaking up the kegs and bottles and parading around. To get a constitutional amendment prohibiting free citizens in a free country to

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drink alcoholic beverages if they choose to do so was doomed from the beginning. But we know that now. They didn't know that in the 19 or teens and early '20s.

So it's really not fair for us to impose our enlightenment or our understanding back onto the citizens who were living at a particular time.

Q. Are historians, through what we've heard described as the historical method, taught and trained to try to avoid just that?

A. I taught the historical method, historical writing, and the one thing we always try to teach our graduate students is don't let what you understand today affect the way you interpret or narrate the past.

Q. Okay. Let's move toward this litigation, this case, Professor. This isn't the first time you have testified in a case where someone was suing a tobacco company, correct?

A. No. I think this may be my fourth time.

Q. Tell us how you first got involved in tobacco litigation.

A. In early 1990 I got a telephone call from a former student and said, Professor -- he was from Greenwood. He worked for a law firm in Greenwood. He said, Professor, I would like to come over sometime in the next few days to talk to you about a case that I'm involved in and I said,

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sure. Clint Duncan was his name. I said, "Sure, Clint, come over anytime." So we made an appointment for the next week.

He came over and he said, "Professor, I'm involved in the Nathan Horton case." I knew about the Horton case because it had been in the press but I said, "Clint, which side are you on?" I knew it was a tobacco, plaintiffs lawsuit against a tobacco company. And I said, "Clint, what side are you on?" He said, "My firm represents the tobacco company."

I said, "Well, Clint, I'm sorry. I can't help you. I think smoking is bad for people. I think it's a dangerous habit. It's hazardous to your health" and I said, "I won't be able to help you on that." He said, "Well, that's not -- we don't want you to testify on behalf of the tobacco industry or this company."

And I didn't even know what company he was working for. It was probably several days or maybe even a week, couple weeks before I knew what company he was working for.

He said, "Look, what we want you to do as a historian is to go back and look at the period of time when smoking and lung cancer became a prominent issue in American society. What we want you to do is to conduct an independent, objective study. What we need to know, what

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we want to know, is what did the American people know about smoking and health. What kind of information, what kind of data was being disseminated to the general public."

He said, "What we want you to do is go back and do a historical study just like you would do of a banking system. Tell us in essence what the people of America in general, and the people in Mississippi in particular, knew about the hazards of smoking and in particular lung cancer." Because that was a lung cancer case.

Q. So did that -- that began your involvement in that case, correct?

A. I never had any idea that 13 years later I would be sitting in a federal courtroom in Little Rock, Arkansas dealing with this same issue.

Q. Okay. Now, over the time, you have mentioned there have been four or five cases. What he asked you to do, sounded like to me, would have required a great deal of time to do; is that fair to say?

A. Well, I told him, "Clint, I can do this." I said, "I already know what I'm going to find. I'm going to find that the people were well aware of the hazards of smoking," but I said, "For me to establish, to base that on sound historical judgment, is going to take a lot of time. I'm going to have to spend a lot of time in the

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library, a lot of time in the state archives," and he said, "Well, we want you to do that."
Q. So you did that at that time?
A. I did that.
Q. All right. And let's move forward to this case. I take it that what you were asked to do in that case carries forward into what you are here to testify about today?
A. Yes. Fundamentally when I agreed to do this case, the same requirement was -- the same request was made of me. They said we want you to go back in time to do a thorough, historical study to determine what the American people in general, and the people of Arkansas knew about the hazards of smoking, how did they learn this, what kind of sources of information, how was this disseminated to them, and in particular, when did they know this. When could you say that the people of America and the people of Arkansas were aware of the hazards of smoking, and in particular the relationship between smoking and lung cancer.
Q. So you have done that in this case, as well as the others you described?
A. Yes, I have.
Q. And you have charged for your time, is that right?
A. I beg your pardon?

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Q. You have charged the law firms for your time, correct?
A. Yes, sir.
Q. I'm sure Mr. Holt will ask this, let's go ahead and ask it now. Over the time that we've described, the 13 year period, just roughly how much have you been paid?
A. The best I can come up with without going back through the records, which I don't even have some records, about $500,000. That's about as close as I can get.
Q. And that's based on time?
A. 13 years, right.
Q. But you charge on an hourly basis, right?
A. Oh, yes. Well, I don't know that I want to use the word charge. When I was sitting there with my former student, he said, "Professor, we're going to pay you for this." Well, that didn't surprise me. He said, "How much would you charge?" I said, "Clint, I don't know. I don't know what my time is worth." He said, "Check with your colleagues in the department and try to determine." So I did. And some of my colleagues had worked for various corporations and governments and the price ranged from 75 to $150. So when I told him that he said, "Well, would $125 be okay?" I nearly fell out of my chair because the State of Mississippi did not pay me anywhere here $125 an hour. So I said, "Clint, that's fine."

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That's what it was until I think maybe four years ago, three or four years ago. The hourly wage, the hourly fee was increased from 125 to 175. So that's what I make, $175 an hour. And there's no differential between my research and testimony time. But after hearing Prof. Kyriakoudes getting $300 an hour, I may want to renegotiate my contract.

Q. You can do that on the next case.

A. Okay.

Q. You said you were asked to determine the degree of awareness or common knowledge of the general public about the health risks of smoking, and in particular the link to cigarette smoking. Did I hear that right?

A. That's correct.

Q. Before we get to what your opinion is, could you tell the jury what you understand and mean by the phrase common knowledge?

A. Okay. I think this is fundamental to the understanding of the smoking health issue. Common knowledge is information that has been disseminated to the general public over a long period of time, by a wide variety of sources, or information that comes in the burst of some spectacular publicity. Either way. Information that has been disseminated a long time or a quick burst of publicity that the ordinary everyday common reasonable

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person will be aware of that information.
That's a long explanation. What I'm saying is this is information that the ordinary common everyday person will be aware of.
Q. Okay.
A. That's common knowledge.
Q. Is there a difference between common knowledge and being aware of it?
A. Okay. Again, I think to understand this case, and all similar cases, there are three words that we really have to distinguish. Awareness, belief, and behavior.
Now, these three words are related but each of them is distinct and separate. It's a separate function. Now, may I define each?
A. Sure, please do.
Q. Awareness is to be conscious of, to know about, some information. This information that has been disseminated to the general public. Awareness is to be cognizant, to know about, to be aware of that information.
Belief is a separate and distinct function. Belief is an opinion or a conclusion that you draw or that you base on your awareness. That's a choice. Awareness is something that is simply disseminated to the general public. You just know about that because you hear about it, you read about it everywhere you go. But belief is a

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choice that people make based on their awareness. You either choose to believe that smoking causes lung cancer or you choose not to believe smoking causes lung cancer.

The third term, behavior. Behavior is what you do on the basis of what you believe. If you believe smoking causes lung cancer, you either quit smoking or you don't quit smoking. You can do either one. Behavior is a matter of choice, on the basis of what you believe.

Okay. So awareness, belief and behavior. And I will go to great lengths in my testimony to distinguish between these three terms.

Q. Okay.

A. Awareness, belief and behavior.

Q. Give us an example of something that you would view as a matter of common knowledge.

A. You stop at a red light and you go on a green light. If you drink too much alcoholic beverages you get inebriated, or if you eat too much and don't exercise you get overweight.

But I think another, if I may, Mrs. Boerner in her deposition was asked if she could smoke in her high school. She said no, we could not smoke. And she was asked well, who told you that? She said, well, nobody told us, we just knew. That's what common knowledge is, something that everybody is aware of.

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Q. And from what sources does one develop common knowledge, what types of sources?
A. You mean what sources do I investigate, do I use?
Q. Let's go there. You prepared a chart and we have, of course, lots of exhibits I read off earlier, but we're going to try to cut that down for this presentation and show most of the exhibits through the Elmo on the screens. And I assume they are on. Is this a diagram, sir, that reflects the various sources? Can you see that okay?
A. Do you have an extra copy of those?
Q. I do.
A. I have to turn here to see this.
THE WITNESS: Judge, we need to get this thing moved over here somewhere.
THE COURT: Then it would be between you and the jury, so we left it there.
THE WITNESS: The sources of common knowledge are varied.
BY MR. CRASS:
Q. Just go around the circle there and tell us, kind of amplify what you mean. Of course, family is common knowledge, what that means.
A. There's an opener in the Arkansas Gazette, a line which I thought was so good. It said from time immemorial little boys have been told about coffin nails. Their

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mothers and daddies tell them don't smoke because they are coffin nails. You learn this from your family.
The educational system. We will go into some detail in a few minutes about what the state department of education and the state department of health of Arkansas taught their children.
Then the mass media. And to a very large extent I focused on newspapers, not exclusively but in the 1950s and '60s, 85 percent of the American people got their news from the newspaper. We only had, in the early '50s two TV networks, and finally A. B. C. made a third one. We didn't have this all day, all night, wall to wall TV.
Q. Those were the good old days, weren't they?
A. They were actually. And then --
Q. I'm sorry, Doctor, go ahead. Mass media being TV and what else?
A. Organizations. Health organizations were vital in disseminating information, especially the American Cancer Society. It was just vital in distributing and disseminating information about the relationship between smoking and lung cancer.
Word of mouth. You know, when these reports, when these startling and sensational reports came out, the next day at the water fountain people say gosh, did you read yesterday's paper? No, I didn't read it, but what

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was it? They tell this.

They go to church, they go to club meetings. Word of mouth. In many of these, and I will mention these later, many of these Gallup polls asked the question have you read or heard about smoking and lung cancer. So word of mouth is a fundamental means.

And then government. State and local and federal governments were very, very active, very, very early in disseminating information about smoking and health.

Churches. I will cite frequently from Methodist and Baptist newspapers that deal with this health issue of smoking and lung cancer, and then popular culture. Television, movies, radio, all of these, songs, all of these were instrumental and viable sources in communicating this information to the people.

Q. Okay. Professor, the jury heard a lot as recently as today about the debate amongst the scientists and the medical community on the health effects of smoking and lung cancer and so forth. Is that topic different than the one that you have researched and are here to talk about today?

A. Yes. The smoking and health issue played out on two distinct and different levels. One was in the scientific community where the great scientists of the country

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discussed this. They did the research, they conducted the studies, and they debated this.

But the other level was in the mass media. This information that was derived from these studies, this debate, was translated into everyday language, street language, and published in all of these magazines, published in the newspapers. And in translating these highly technical medical studies into everyday language, it was over simplified in many cases, and in many cases the press moved to conclusions and presented this information in a way that the general public moved in advance, actually, of the scientific community. But it played out on two different levels. And my interest was the public level, the mass media level.

Q. And what time period have you focused on, Professor?

A. One of the first things I did in this case was to read the depositions to ascertain what time period was pertinent. But any kind of historical study, you just can't start at a certain date. You have to look at the preliminary material, and so I went way back. I went back further than I probably needed to, but that's what historians do. As Aristotle told us, let's begin at the beginning. I began with Columbus.

Q. We'll get to that in a minute. Let me ask you, sir. You talked about the general subject matters that lead to

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common knowledge, but can you just describe for the jury some of what's in that box that we introduced earlier, just some of the specific items or sources that you looked to as you went through this project?
A. I looked at all the major news magazines, Life, Time, U. S. News and World Report, News Week. These are the standard traditional weekly or monthly magazines. And of course, Reader's Digest. It's a major source of information for this. I looked at Consumer Reports, which is a monthly magazine established in 1936 exclusively in the interest of the consumer.

I looked at other national magazines. I also looked at newspapers. I looked at the New York Times from time to time and others, but I really began to focus in on Arkansas sources. I began to search the Arkansas Gazette and the Arkansas Democrat and the Arkansas Baptist and the Arkansas Methodist.
Q. We'll get into those later but did you do it or how did you get access to that?
A. We had a real problem getting the Arkansas Gazette at the University of Mississippi. We don't have the Arkansas Gazette on microfilm or the Democrat on microfilm. So I got them from the University of Arkansas in the library loan, but they would only send us five reels at a time. That was only like about a week at a time. And I got some

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graduate students to go through these newspapers. I told them what I was going, what I wanted, and they were doing that. But we just, you know, we would never have gotten done.

So I found a place in Chicago, the Chicago Historical Society would send us more reels at a time. I also had a former student at the University of Wisconsin, and I knew Wisconsin had a marvelous collection of newspapers. So I got him to do that.

And I also knew there was a law firm in Washington that I had worked with before, and I said, look, can you get somebody to help me read the Arkansas Democrat and the Arkansas Gazette.

Well, with all of these people working, we still were not going to get it done in time. So I came to Little Rock several times myself to look at the Arkansas Democrat and Arkansas Gazette, and also I wanted to look at the Arkansas Baptist and the Arkansas Methodist. But more particularly, I wanted to look at the legislative records of Arkansas. I wanted to look at the Secretary of State's records, and I wanted to look -- and the school records, I want to look at. So these are the sources that I searched.

Q. All right. Did you look at internal tobacco company documents? Is that something that you thought affected

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common knowledge?
A. No, I didn't. I only looked at what the public would have known at a given time.
Q. All right. And how about tobacco cigarette advertisements, did you look at that?
A. Well, I looked at them but I did not consider them as a source of health information. So I told the guys who were working for me, I said, "Look, if there's some ad that really catches your eye, that's kind of a eye popper, copy it, but otherwise don't make copies of the ads."
Q. Now, we'll get into the specifics of what you saw in the Democrat and the Gazette and Arkansas religious publications, but before we get into those specifics, sir, did you, as a result of the work that you have done, develop an opinion about when common knowledge existed as to the link between cigarette smoking and lung cancer and the difficulty in quitting?
A. Yeah, I did in fact arrive at a conclusion, and my conclusion is, based on this study, that public awareness on the hazards and dangers of health, and in particular the link between smoking and lung cancer, reached the level of common knowledge by the end of 1953.
Q. What happened in the '50s, late '40s and '50s that you think lends itself to that conclusion or supports that conclusion?

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A. Prior to 1950 there was studies and articles published in journals and newspapers indicating a correlation of some type between smoking and lung cancer. But the number of lung cancer cases were so few, so rare, that these studies didn't attract a great deal of either scientific or popular media attention.

But something happened in the mid to late '40s. The number of lung cancer cases literally exploded. There was a dramatic increase, and this dramatic increase caused scientists and the media to begin looking for a cause, a reason for this.

And in the 1940s scientists began to look at this. And in 1946, in February of 1946 the Journal of the American Teachers Association had an article, an editorial in February 1946 under title, "Cigarette Smoking Causes Cancer." They cited a scientific study that said there is now good evidence that smoking causes lung cancer, and they had a chart of the increasing consumption of cigarettes and the increasing number of respiratory cancer. This is in February of 1946. Went out to every teacher in the country, 400,000 subscribed.

So still the numbers and the sensational stuff really didn't come alive until something happened in 1949 in Memphis, Tennessee at the Peabody Hotel. Dr. Graham presented a paper on the study that he had done in a

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hospital in St. Louis. He had studied 2,000 people who had lung cancer. 95 percent of the people who had lung cancer were cigarette smokers.

In January of 1950 the Reader's Digest reported the findings of this study under the title, "How Harmful are Cigarettes?" This was an article that said, look, there's increasing evidence. We don't know, but how harmful are cigarettes?

In the next year or two there were additional studies and additional media coverage of these studies. In 1952 Reader's Digest published an article entitled, "Cancer by the Carton." This article quoted Dr. Alton Ochsner about what his findings on smoking and lung cancer were. So this increased the coverage and correspondingly increased public awareness.

Finally from '52 to '53 additional studies came out, additional coverage came out. In November of 1953 Time Magazine published another study done by Dr. Graham, this was the mice study, under the caption, "Beyond any Doubt."

So when I was looking at this, I'm saying here we are in 1950. They are asking the question how harmful are cigaretts. By November 1953 Time Magazine is saying beyond any doubt smoking causes cancer. And I said, when I first went through this, I said, well, as of December,

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as of November, December, the level of public awareness had reached what I call common knowledge.
But I said, you know, I need some other source. I want some authoritative unimpeachable source that will validate what my opinion is. I found that source in a Consumers Report article. The Consumers Report said this. Quote. "In 1953 medical evidence linking cigarette smoking and lung cancer became general public knowledge."
Now, that was the authoritative source that I was looking for. But there's an old Russian proverb that says trust but verify. I trusted the Consumers Report but I wanted some verification. I found that verification in a 1954 Gallup poll. In June of 1954 Gallup asked the American public have you heard or read anything recently about smoking -- that smoking may be a cause of lung cancer? 90 percent, 90 percent of the American public in 1990 (sic) said they had heard or read something recently that smoking was the cause of lung cancer.
All right. I had my authoritative statement and I had the verification. So it is my historical opinion as a historian that the medical evidence linking cigarette smoking to lung cancer was common knowledge by the end of 1953, certainly as verified in this June '54 poll.
Q. All right, Professor, we'll get into the specifics of that, but let me ask you something that I'm sure you will

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be asked. Are you aware that scientists and medical doctors were debating that topic after 1953?
A. Well, that's what I meant when I said the smoking and health issue played out on two different levels. In the health community there was an ongoing debate, an ongoing discussion. But in the general public awareness that smoking may cause lung cancer reached the level of common knowledge. Whatever was happening in the scientific community was separate and distinct from the fact that the general public was aware that smoking may cause lung cancer.
Q. Okay. Professor, now that we have heard your opinions, let's go back and go through kind of a chronology of some of the documents and sources that you found and, again, the jury has heard from more historians than they want to hear from I'm sure, so we're not going to cover 400 years. Let's start, sir, when did the public first hear about the issue of smoking and health, and I think we have a demonstrative aid to help you on that, do we not?
A. Tobacco was introduced into western culture, into western society, as a harmful and habit forming substance. The first appearance of tobacco in western culture was the statement by Christopher Columbus that it is a vice and that it is a habit that is extremely difficult to quit.

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The sailors said they couldn't quit.
Q. We heard from Prof. Kyriakoudes that King James, we heard a lot about King James, but we had the King James edition of the Bible, right, the standard edition of the Bible? That's the same King James or am I wrong about that?
A. That's correct.
Q. This Counter Blast, which I believe is in evidence as exhibit 1024, you heard Prof. Kyriakoudes talk about that. I don't think we actually showed the counter blast to the jury. We now have it in front of them.
A. Well, that was a rather novel interpretation of the counter blast. What the point is, this was what I think was the first statement issued, official statement by a government official proclaiming that tobacco was harmful to your health.
I think what is so significant, in 1604 he says it is dangerous to the lungs. This is King James in 1604 telling his people tobacco is dangerous for your lungs.
Q. All right. Help me understand, Professor, the significance of what would have been said in 1604 by King James as it relates to the modern issue of smoking and health. Did later authorities refer back to the counter blast?
A. It's all through the Arkansas papers, and even

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surgeon general Terry in 1964, in his historical resume of information about smoking cites King James, the counter blast of King James. We actually have in my library one of the original copies of that. It's in our rare book collection. I just thought you might be interested.
Q. I am but I guess that's not something you can check out and bring to the courtroom, is it?
A. I tried to get it but they wouldn't let me have it. It's in a vault.
Q. Let's fast forward to more modern issues or times, and that would be the late 1800s. And let me ask you, have you looked and determined through your research the Arkansas facts relating to the issue of health and smoking during that time period, late 1800s and 1900s?
A. Mr. Crass, I wanted to know what was happening in Arkansas. What did the people of Arkansas know, and when did they know it, and how did they learn this. So I came over here and, you know, fortunately this is something I love to do. The research is the fun part of history. So I came to the department of archives here in Little Rock and I spent days, I don't even know how many days, going through the old early Arkansas newspapers, and I have found some that I think are instructive and so I've asked you to make some --
Q. Yes, we're putting on the Elmo now exhibits 1732 and

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2637 for the record, but tell us what they are.
A. This is January 5, 1892. The merchants of Clarkville have signed a petition saying we're not going to sell cigarettes anymore. Then December 5, 1894 the merchants in Harrison said the same thing. And one of them I was trying to read. Papers in and out of the state are requested to make a special note of this. Those people were really proud of that. They wanted people all over the state and anywhere else to know that there was a war against the cigarette in Clarksville, Arkansas.
Q. If I can read it right, what is the headline on the Harrison story?
A. "The deadly cigarette." In between these two, this is what's fascinating, in between these two articles the state legislature of Arkansas in 1893 banned cigarettes, banned the sale of cigarettes. It was house bill 531, the title of which was to protect the public health.
They passed this, but before it was signed by the governor, it was brought back up for consideration and repealed and amended. They were concerned about how this would affect Hot Springs, all the tourismism in Hot Springs. So they didn't pass it in 1893.
Q. Did there come a point in time where the legislature in Arkansas did adopt such a law?
A. In 1907.

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Q. We're putting on the screen now exhibit 2639, and this is the actual bill I believe?
A. Yes. The committee on health.
Q. This is from the 1907 Acts of Arkansas?
A. Yes. Act 280. This bill was recommended by the legislative committee on public health, and the bill was passed prohibiting the sale, the distribution or the giving away of cigarettes in the State of Arkansas.
Q. Was Arkansas alone in that type of law being passed?
A. No.
Q. You have got a map that demonstrates that I believe, Professor. How many states actually banned during that time period?
A. 16 states from 1890 to 1930. 16 states actually banned the manufacture, distribution and sale of cigarettes.
Q. That's the states in red?
A. Yeah. I think that's the red.
Q. And actually 23 states considered it, is that right? Do I have that? I believe that's right.
A. Oh, yeah, that's right. 23 states actually considered a ban. So 39 states from 1890 to 1930 either banned or considered banning the sale of cigarettes.
Q. What would lead legislators to do that?
A. Their concern for public health. In almost every

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case that I've looked at, now I've not seen the laws in all of the states, but in every state that I have looked at, the motivation for this law to ban the sale of cigarettes was a health concern.
Q. I guess at some point they repealed that law, correct?
A. They did.
Q. What was the significance of the repeal?
A. The dough boys, when they came home, the veterans of World War I, said we have fought a war for freedom. If we want to smoke, we ought to be able to smoke. To a large extent this was a movement by the veterans to repeal this, and the law that repealed this ban was to be administered by the state department of health. The law that repealed this ban provided that retail cigarette licenses, if you sold cigarettes, and you are at a grocery store, you had to get a license from the state health department to sell those cigarettes.
So it was not a matter that the concern for health had changed. This was a matter of choice. These soldiers said if we want to smoke, we ought to be able to smoke.
Q. Let me stop you, Professor, and ask. I think sometimes we lose sight. How did you know all that happened? Did you read that in a book?

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A. I'm sorry, it's in that -- where is that stack of papers?
Q. There's a box. How did you do it? Did you go out and look up laws and look up --
A. That's what historians do. That's what I do as a historian.
Q. Let's continue on with what you found during that process. When the veterans come home, the law is repealed. Is that the end of opposition to cigarettes?
A. No. The important part of this I think is that in the 1920s the opposition to smoking did not disappear, it did not evaporate. In fact, it intensified as more people began to smoke. As the numbers of smokers increased, the public opposition to it increased, and I had a lot of fun in the 1920s looking at this stuff because Gov. McRae --
Q. Governor of Arkansas?
A. Governor of Arkansas, issued in 1922 --
Q. I'm showing on the board here an exhibit, I believe it's 2651, if I'm not mistaken.
A. As best as I can determine Arkansas had the first great American smokeout of any state. This is the earliest reference I can find to a governor saying on, I think it was March 22nd, or whatever date. He said on that day let's nobody smoke. Let's have a Arkansas smokeout. And this, as you can imagine, this no tobacco

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day received wide coverage in the Arkansas newspapers.
And I happened -- I wanted to make sure that this was an official government proclamation. So I went to the state department to look for the governor's proclamation.
Q. That's on the screen now and that's exhibit 2654, and that's the official proclamation.
A. That's right. And then the next exhibit is the picture of the handsome Arkansas governor along with a reference in the Arkansas Gazette about the no tobacco day.
Q. That's something that I guess is common these days, but your research showed that's the fist time it happened in this country?
A. As far as I can tell. I haven't searched every state, but as far as I can tell this is the first no smokeout.
Q. You showed them the Arkansas Gazette. Was there other publicity of this smokeout? And where did you find that?
A. Yeah. In the Baptist Advance. This later became the Arkansas Baptist and, you know, there was an association in Arkansas called the No Tobacco Association. This was an organized group of people who were committed to educating the public about the dangers of tobacco and they

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are the ones, I suspect, I have not been able to get a direct link, but I suspect it was this group that prevailed upon Gov. McRae to issue this no tobacco day.

One of the state's prominent physcians, Dr. T. B. Bradford was the educational director of the no tobacco day, and he went around the state proclaiming the dangers of smoking.

Q. I believe on the blow-up there's a reference to T. B. Bradford, correct?

A. Right.

Q. I think we also have a reference from the Arkansas Methodist promoting the no tobacco day. So this is something the governor proclaimed and other organizations picked up on it and encouraged it.

A. Right. In all -- there was five newspapers published in Little Rock at that time. All four that I could find gave prominent attention to this no tobacco day. The only one I couldn't find was called a Baptist Commoner. They didn't have -- they couldn't find a copy of that. But the editor of the Baptist Commoner was a member of this No Tobacco Association. So all five papers published in Little Rock supported this.

Q. Did you ever find any evidence of a paper in Arkansas called the Statesman?

A. No, I didn't.

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Q. Let me ask you, sir. It sounds like the government and churches were doing things to encourage people to avoid tobacco. Did you find evidence of other efforts, maybe commercial in nature, to try to get people to quit using tobacco?
A. Yeah. Beginning in the early 1900s there were remedy ads. We can remedy the smoking habit, or we can help you get rid of this terrible addiction, and these are just some of the examples of remedies that I found in these early Arkansas newspapers.
Q. And you are showing them, just for the record, exhibits 2640, 1745 and 1732 and then there is some others from the paper?
A. Yeah.
Q. Let's show those, and those are 2648 and 2649.
A. The next two are, again, samples but I found the one on the right especially interesting and significant. The fact that women were smoking to such an extent in 1922 that there was a market for quitting, for stop tobacco remedies for women.

Now, I did a case in Texas and I looked at the Texas newspapers, and I found this same ad in the Texas newspapers. So there was a significant enough market for this. People were going to make money on selling these no tobacco remedies.

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Q. Professor, one of the things on your common knowledge chart were churches. Did you find that religion played any role in the smoking and health issue during this time period?
THE COURT: Mr. Crass, before you go into that, can we take a short recess?
(Recess)
BY MR. CRASS:
Q. Professor, I was kind of relieved during the break to find out I wasn't the only one that thought it was hot in here. We were talking about the roles the churches might have played in regard to smoking and health issues. Did you uncover or find any evidence of that?
A. Yeah. Throughout the '20s and '30s and '40s and '50s and '60s, both the Arkansas Methodist and Arkansas Baptist gave important attention to the smoking and health issue. In the Methodist church they had this running debate on whether they should allow their ministers to smoke.
It was official church policy that ministers in the Methodist church could not smoke and that was a running debate. And let me say this about the moral aspects of smoking and health. All the moral objections to smoking were based on medical premise. It was not something that was religious in nature, it was medical in nature. That's based on the first Corinthians, chapter 3,

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verse 16 and 17 where Paul says know ye not that your body is the temple of the Holy spirit. If you do anything to defile your body, you are disobeying the laws of God" and says he will destroy you. So this the moral consideration. The moral aspect was based on a medical premise.
Q. Did you find evidence in religious newspapers or magazines of that?
A. I'm sorry, I thought this was already up here.
Q. We're looking at 2663, 2664 and 2666.
A. Not only did the Baptist Advance publicize this no tobacco day, they took advertisements for anti-tobacco remedies. We see one here that's in the Arkansas Baptist in 1938. These two deal more specifically with anti-tobacco views in the 1930s. They were held all over the state.
Q. We have a map of the anti-tobacco meetings in the state. How did you learn all that?
A. Well, again, that's what a historian does. We go to the sources, and when I found out where these meetings were, I went and got an atlas of Arkansas to find out where these towns were. I knew where some of them were but it was an easy matter of finding out where these towns were and where these meetings were being held.
Q. What was the purpose of the no tobacco league?

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A. Again, it was to inform the general public about the harms of smoking and to persuade people not to start or to quit if they did in fact smoke.
Q. And we have again a document from the Arkansas Baptist in 1934.
A. Yeah. This is really an interesting article. It goes into great detail about the harms of smoking and what we should do. This no tobacco league was a national organization. Their, actually the head of the anti-tobacco league throughout the country came to Arkansas and participated in some of these meetings.
But I use it just as another example for showing that in the 1920s and '30s the coverage of the smoking and health issue did not wane. It did not decline. It intensified actually.
Q. Let's shift from the churches to the school, Professor. I think you mentioned earlier what role the school and educational process played in it. In particular, what did you find in Arkansas?
A. Well, I found as early as 1935 there was a curriculum guideline issued by the state department of education requiring health classes to be taught, and in those health classes requiring information on the dangers of smoking to be taught.
But I want to move forward real quickly to

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1939. I picked this one out because this is germane to the time that Mrs. Boerner was in school. I want to spend a little time with this if I may. This is a curriculum document produced by the state department of education. It is a curriculum guideline for what health teachers in Arkansas are required by law to teach the children of Arkansas.

This also serves as a guideline for textbooks. The textbooks that are adopted in the State of Arkansas must conform to the curriculum guidelines to be approved, and I want to look at three aspects of this. The objective -- this is elementary school. This is about the time that Mrs. Boerner was in elementary school. What is the objective of this? To avoid cigarettes or other forms of tobacco. Teach kids not to smoke. To avoid these.

Discuss the effect of the use of tobacco and alcoholic drinks on boys and girls. This could take place a different variety of ways and means. I think one of the most important means is the outcome. What is the outcome? The outcome is a requirement for a promotion to the next grade. It is required by state law.

Under this curriculum guideline published in 1913 for a child to be promoted to the next grade they would have to know that the use of tobacco and narcotics is harmful mentally and physically to growing children.

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Q. So that set in place the requirement that the textbooks try to meet these objectives, right?
A. That's correct. The textbook to be adopted has to have information that meets the requirement of this curriculum guideline, and we found several textbooks that we made demonstratives of.
Q. Let's look at the first one, sir. Tell us what this is.
A. All four of these textbooks were used in the schools of Arkansas when Ms. Boerner was a student in the public schools in Little Rock. "Living at our Best" by C. P. Emerson.
Q. You have actually got the book, right?
A. Yeah. These are the facts that are discovered and in this textbook. "Occasional users of tobacco showed a death rate 20 percent higher than abstainers. Temperate use of tobacco showed a death rate of 42 percent higher than abstainers. Heavy users of tobacco showed a death rate 57 percent higher than abstainers." These are lessons that were being taught to elementary school children, and the statement is, "From these facts it appears that the use of tobacco is almost as injurious to the health and length of life as the use of alcohol."
Q. This was a textbook used in Arkansas?
A. All four of these were used in Arkansas.

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Q. Show us the next one.
A. "Health by Doing" by W. E. Burkard. "Tobacco does no one any good. It does some people a great deal of harm. It may do little harm to some grown-ups but it may have very bad effects on others who become mastered by the habit. It will hurt them in many ways, affecting the heart, lungs, nerves, digestion, eyes and throat. The tobacco habit grows on most people, that is, it gets worse. They smoke more and more until they are smoking all the time. It is particularly harmful to children. Bad habits are hard to stop. Do not start them."

This is information that was being taught to school children in the State of Arkansas. And then two others, and I'll try to move through this quickly. "Safety Everyday" by Andress. "Many grown-up persons smoke tobacco. They have gotten into the habit and they do not feel that it hurts them. The first time they smoked the poison in the tobacco called nicotine may have made them feel very sick. Since their bodies have become used to the nicotine, but the nicotine still continues to act as a poison to most people. Nearly all doctors will tell you not to get the smoking habit. "

And the last one, "Habits, Healthful and Safe." Does smoking make you healthy, wealthy and wise? No. Quite otherwise. Experiments and common sense have shown

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us that they may have the opposite effect."

Mr. Crass, any child who went through the public schools of Arkansas would have been taught this, which means if teenagers smoked in Arkansas --

MR. HOLT: Objection, Your Honor. May I voir dire the witness on that statement he just said?

THE COURT: He wants to ask you some questions.

VOIR DIRE EXAMINATION

BY MR. HOLT:

Q. What school did Mary Jane attend?

A. Little Rock and for a time she went to school in Memphis, Tennessee.

Q. What exact textbook did she have available to her at what exact grade? Can you tell me that?

A. I've got these facts and figures.

Q. I'm not talking about in general. I'm talking about what textbook her school distributed and her school year. Are you aware, sir, that she has testified that none of this was taught to her as well as Mr. Boerner. You are aware of that, correct?

A. If she went to the public schools in Arkansas, wherever she went, this was a unified uniform state requirement that every child who goes through the State of Arkansas has to be taught health courses.

Q. Sir, you said a general statement as to what had to

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be taught. Fine. Then you show these different textbooks that have great differences in the wording and the language. Can you tell me specifically which one her teacher used to teach her?
A. No, I can't do that, no.
Q. Then your statement, then, that she has seen all this was speculation, wasn't it, sir?
A. Actually not. Because I have written textbooks for Mississippi, and my textbooks, when I get ready to write one, I have to go before the curriculum commission. They say to me, Prof. Sansing, this is what we want the children of Mississippi to know.
Q. I don't care about Mississippi. You just answered that you can't say what textbooks her teachers used to teach her. Therefore, I object to your saying that she specifically saw something because you simply don't know, isn't that correct?
A. Did I say that? Did I say specifically that Mary Jane Boerner saw this?
Q. You said they saw.
THE COURT: Wait a minute, wait a minute, let's don't get in an argument here. Slow down.
BY MR. HORN:
Q. Isn't that what you said?
A. I might have to ask the court reporter to read it

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back. I would like to see what I said.
Q. Let's do it this way. If you said that --
A. I would like to hear what I said before I take it back. I may not want to take it back.
Q. Did you say that she specifically saw these materials?
A. I don't think I did.
Q. Okay. And if you did say that, it was a mistake?
A. Can we ask her to read what I said.
Q. I don't want to waste the time. If you did say that it was a mistake, is that right?
A. If I said I have personal knowledge that Mrs. Boerner, when she was in school used this particular textbook or this particular textbook, that's probably not -- that's not a correct statement.
Q. Thank you, sir. That's all I have.
A. But I don't believe I said that.

DIRECT EXAMINATION

BY MR. CRASS:
Q. The jury will decide what you said, Professor, but it's your testimony that the state law you looked at required textbooks to say certain things. These four textbooks were used in the State of Arkansas during the time period that Mrs. Boerner was in school?
A. That's correct.
Q. You can't testify that her teacher read it to her or

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Mrs. Boerner read it, you are just saying the law required the books include the material, and you found the books that did satisfy the law that had the material in there about health effects of smoking. Is that fair?
A. Yeah. I can say if she went to public schools in Arkansas she was taught by a health teacher that smoking was harmful.
Q. All right.
THE COURT: Here is the testimony. Any child who went through the public schools of Arkansas would have been taught this, which means if teenagers smoked in Arkansas -- and then came the objection. Okay.
BY MR. CRASS:
Q. Let's move on to another topic, Professor.
A. Okay. I want to know what I said.
Q. The judge just read to you what you said.
A. I believe the judge.
Q. I think Mr. Holt was anticipating something he thought was coming.
MR. HOLT: Your Honor, exactly. He suggested that she saw this material and he admitted now that he can't say that.
THE COURT: Well, I appreciate the testimony was that this is the textbook that was used and all the children were exposed to it. I don't think he testified

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that Mrs. Boerner specifically read or relied on any particular textbook.
MR. HOLT: That's the only point I want to make, and I'm sorry for interrupting. I apologize.
THE COURT: That's all right.
BY MR. CRASS:
Q. We talked about churches, we talked about schools. What have you seen in the mass media? Have you covered everything you want to cover about schools?
A. Yeah, that's fine.
Q. What did you find in the mass media that you identified on the chart of common knowledge that related to this issue?
A. I obviously wanted to know what the largest circulating magazine, perhaps in the world, but I know for sure the largest circulating magazine in America had to say about smoking and health. That's the Reader's Digest. So I went to the Reader's Digest.
Q. We put up on the screen the Reader's Digest. By the way, is it today the largest circulated magazine or has it kind of fallen off?
A. It's kind of fallen by the way side. In the 1950s Reader's Digest had a circulation of 10 million. They estimated that at least five people read every issue, because it's in barber shops and beauty shops and doctor's

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offices and waiting rooms, which means that in the mid '50s 50 million people were reading these articles.
In 1955 there were 151 million people in America. If in fact 50 million people were reading these articles, one out of every third American was reading these articles. In the 1950s.
Now, some of these I'm going to cite here are in the 1930s and 1940s but it was still, even then, the largest circulating magazine in America.
Q. So you've got on the screen here some of the Reader's Digest articles. You want to look at them individually?
A. Yeah. What I'm doing with this is to show that this was in fact a national, a state and local issue. It was a federal, state, local and personal family issue.
Q. Let's look at the first one February 1935.
A. I want to read this. This is 1935. "One would not like to think that one has become such a slave to tobacco that one cannot do without it -- a drug which weakens the heart, damages the nerves, gives you cancer and catarrh" and so on. So the Reader's Digest is telling millions of readers smoking gives you cancer. It doesn't specifically say lung cancer.
Q. The title of that was "Giving up Smoking"?
A. Right.
Q. Let's go to the next one. By the way, the one we

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just looked at was 786. The next one is 788.
A. "One cigarette is just as dangerous to an ex-smoker as one drink is to a reformed dunkard. Actually excessive smoking is just a form of drunkenness. This speaks to the habit forming nature of tobacco." And there's a dissemination of information about that.
This next one is 1931. These are all before the big cancer studies come out. "The cause of most of the trouble of course is nicotine. You do get a lift when you light a cigarette, but it's exactly like the lift you get from cocaine, heroine and marijuana." The Reader's Digest was telling its readers you can get hooked on cigarettes just like you can other drugs. It's a narcotic, you can get hooked on it.
And then the last one, "I had been a chain smoker for 40 years. With chronometer precision I hammered another nail into my coffin every ten minutes."
Q. You highlighted for us the Reader's Digest. Did there come a point in time where the American Cancer Society recognized the role that Reader's Digest had in this?
A. Actually in 1964 the American Cancer Society singled out Reader's Digest for its contribution. I think to quote, "making the public aware of the hazards of smoking." So it was recognized.

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Now, you can talk about you can add up the number of articles. You say, well, there are like 36 articles on smoking and health over a 40 year period and 3,000 articles on something else. It's not the number of articles but it's the impact of those articles. It's how serious people take these articles on smoking and health that's important, and the one that they really took serious and they began to take serious causing this increasing level of public awareness was the next one. January 1950.

Q. Again, this is Reader's Digest. Let me ask you before you talk about that, we've heard talk about World War I, World War II. Did the controversy about smoking in any way change after World War II?

A. No. Again, post war America saw a dramatic increase in the cases of lung cancer. The increased number of those cases created what we've all called the cancer scare, and that intensified, multiplied, amplified the publicity on smoking and health.

Q. I remember Prof. Kyriakoudes struggling with that cancer scare.

A. Well, lung cancer was such a dreaded disease that in the early 1950s in an obituary of a person who died of lung cancer, they wouldn't even mention it. They would not list in his obituary that he died of lung cancer.

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This was a mysterious disease. It was -- so nobody knew what caused it and the death rate among lung cancer was 95 percent.

And so all this quick burst of publicity about smoking and lung cancer, newspapers talked about the smokers in a panic all over the country. Others say smokers are scared out of their wits. Others that say -- let me -- never mind, go ahead. I can't think of what that other one was, but I'll think of it later.

Q. Let's go to what you put on the board, I think it's exhibit 793. This is the 1950 Reader's Digest entitled "How Harmful are Cigarettes."

A. This is the one that I referred to earlier. The surgeon general's report of '64 pretty well cites the Graham study.

Q. Let me stop you because the jury knows more about Ernst Graham or Everett Graham than they do me at this point. You don't have to tell them who Dr. Graham is but this is referring to the same Dr. Graham, right?

A. I won't bother them with the details. I'll discuss with them the public reaction to that, and the almost frenzied media response to that. This is January 1950 as we are beginning to feel this cancer scare. "Dr. Graham's studies had covered close to 2,000 persons. It is expected to show that over 95 percent of the patients with

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lung cancer smoke a pack of cigarettes a day or more and have done so for many years." This was the beginning of the cancer scare.
Q. Did that get picked up in any of the -- well, we'll get to that in a second. This was the beginning of also the report of the scientific studies. Wynder, Graham and Hanmer and Horn and so forth. You don't have to explain all that. We're going to go through the press coverage of it and what impact you think that had on common knowledge. Is that okay?
A. Yeah, sure.
Q. Let's talk about the first major study, and I think you referred to the Memphis and the Peabody.
A. Yeah. Graham made this report in a symposium in Memphis, Tennessee in 1979. I think that was like November of 1979. A month later -- 1949. A month later in that report, and the sensational findings in that report, were reported in Reader's Digest under this question, "How Harmful are Cigarettes." Nobody really knew and the press was saying, well, we don't know but just how harmful are cigarettes and they cited this report by Dr. Graham, 2,000 people were studied, 95 percent of them were smokers.
Now, again, you don't have -- you may not have read this but when you went to work the day after this

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came out, you lit up a cigarette, some guy is going to say, hey, did you read Reader's Digest. No, I didn't. What did it say? It says you got a 95 percent chance of getting lung cancer. That's not -- it's not that high but he's going to say that's what he read. 95 percent of the patients with lung cancer smoked a pack a day.
Q. All right. Then in 1950, again, the jury has heard testimony about the retrospective studies. Are you familiar with that?
A. Yeah.
Q. Did that get publicity in the mass media, the newspapers?
A. Every study, every study was given more or less media attention, because this was an issue of sensational dimensions and you know the press. We all know the press loves a sensational story. So a story like this gets massive, almost round the clock coverage.
Q. That seems hard to believe given if that story came out today would it even generate a headline? If it came out today that someone said smoking causes lung cancer, would it generate a headline?
A. I don't think there's a living, breathing human being in America today that doesn't know that smoking may cause lung cancer. It's not big news now.
Q. What you have done as a historian is take us back to

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1950 and demonstrate how the public and press reacted to the news at that time, correct?
A. Yeah, that's correct.
Q. Now did it make it into the Arkansas papers?
A. Yes.
Q. Let's look at an example.
A. The Arkansas Gazette July 18, 1950.
Q. This is exhibit 1155. The headline is, "Studies Indicate Cigarettes are Lung Cancer Cause". Sub headline is "Another Nail in the Coffin."
Q. Before we get to the article, tell me how the phrase coffin nail and phrase cancer stick and how did those come into being and what impact did it have on common knowledge?
A. I have seen the reference to coffin nails as early as 1880, I believe. I know about the turn of the century, by 2000 (sic) coffin nail was a common slang term for cigarettes.
You know that's not a moral term. That's not a moral consideration. A coffin is a box that you put dead people in. That's a medical condition, not a moral situation.
Q. All right. So the Gazette used that as a sub headline as an intro into this report on the 1950 retrospective studies, correct?

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A. Right.
Q. And do you want to highlight for the jury what that article said. Let's go to the blow-up.
A. "Three teams of scientists today blamed smoking, especially cigarettes, for apparently causing part of the increase in lung cancer, the fastest growing type of cancer in the United States."
Q. All right. You also have a --
A. It made the Democrat --
Q. -- Arkansas Democrat?
A. -- as well.
Q. And at that time you knew, did you not, there were two newspapers, a morning and evening paper?
A. Yes.
Q. So this is the Arkansas Democrat reporting on the same --
A. Same date.
Q. -- subject, right?
A. "Three U. S. reports said cigarette smoking is apparently partly responsible for the risk in the cancer of the lung." Here we are at the beginning of the cancer scare.
Q. Now, we also have articles from the New York Times. Of course, you heard Prof. Kyriakoudes talk about the New York Times. Was that the national paper of record at the

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time?
A. No, it wasn't, but I don't quibble over what was. It was not even the largest circulating paper in New York.
Q. Do you have any idea what the circulation was in Little Rock?
A. Oh, yeah. In Little Rock? No, I don't know.
Q. So we've got it in the Democrat, we've got it in the Gazette. Here is the story in the New York Times, correct?
A. Basically the same thing. "Smoking found tied to cancer of lung 94.1 percent of male studied use cigarettes."
Q. And they are citing the study.
A. So in 1950 and 1951 the medical studies are increasing. They are being reported in the press. And the level of public awareness is increasing as these new studies are made and as these new studies are reported.
So we get to 1952 which in the history of smoking and health, this is one of the most famous articles of all.
Q. You are talking --
A. "Cancer by the Carton."
Q. Reader's Digest 1952?
A. Right, "Cancer by the Carton."
Q. Why is that significant?

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A. Well, it kind of, it represents a move on the part of the Reader's Digest. Reader's Digest is becoming increasingly convinced that there is a causal relationship between smoking and lung cancer, and their reporting on this becomes increasingly, again in that direction.
Q. Was there another significant development in 1953?
A. Oh, yeah. We're not going to use this one?
Q. Well, if you want me to.
A. The jury has seen more of these articles than they need to see.
Q. All right.
A. But in 1953 one of the, I think, two most important studies and the two studies that receive the most attention, the most spectacular coverage, was Dr. Graham's study with mice, and if they already know this, I don't need to go back over this, where they took the tar from cigarette smoke, painted it on the backs of mice and caused lung cancer.

Time Magazine, this was in November of 1953, Time Magazine reported this new study under the title "Beyond Any Doubt." I think this title and this article represents what I consider the gradual expansion, the gradual extending of the level of public awareness to the level of what I call common knowledge.
Q. Was Reader's Digest and Time Magazine the only place

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that appeared?
A. I've got several others.
Q. Why don't we show those to the jury pretty quickly. We've get Life Magazine from December 1953.
A. This is a pictorial article dealing with, it's called the Graham Wynder Croninger study. This is a spectacular thing because prior to this time we were talking about statistics or numbers, but here we have a laboratory situation, and the general public could get its hands on this. The statistics escape most of us, but here they can get their hands on this.
Q. I don't think we have any examples to put up on the screen, but this got up into the Arkansas press, too, did it not?
A. Yeah. It was there. I'm sorry.
Q. I think we shortened it down.
A. Okay.
Q. Then what happened next? What happened in this process after '53 and the story in Time Magazine? Again, what you are saying is, in your opinion, as of the Time Magazine article there was common knowledge among citizens in this country that smoking caused -- there was a link between smoking and lung cancer.
A. It is my opinion that by the end of the year of 1953 that the medical evidence linking smoking cigarettes to

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lung cancer reached the level of what I call common knowledge.
Q. You are aware that doctors were still debating it, scientists were still debating it?
A. I'm talking about the public. What the public knew and what the public -- the level of awareness in the general public.
Q. All right. What happened next in that process?
A. I think the two most important studies was the Wynder Graham Choninger study that came out in November of 1953, and the next more important one was the Allen Horn study in June of 1954.
Q. Tell me about the circumstances under which that was released to the press.
A. In 1952 at the uptake of the cancer scare, the American Cancer Society said we've got to conduct a massive study to determine if smoking causes lung cancer. So they established a study of 200,000 men. This study was to be a prospective study. We're going to study the men as they move forward, not a retrospective study of finding sick people and find out what caused the sickness. They are going to find normal, everyday well men and follow them and see what happens.
This started in 1952. Their preliminary figures in 1954 were so startling that Hammond and Horn said we've

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got to make this information available to the public, and they said the best available forum for this is the American Cancer Society, or the American Medical Association. The American Medical Association was meeting that year in San Francisco in June, starting June 21st. They contacted the American Medical Association and said, look, we want time on your program to show you these figures.

American Medical Association said the program is already set. No way we can put you in. Hammond and Horn said look, look at our figures. Look at the findings. The American Medical Association looked at those figures. They gave them top billing on the first day of the meeting on a Sunday afternoon. They came out to San Francisco and presented these findings on June 21, 1954 and, you know, we now have a phrase that, and this is, I'm violating my own rules of not using the present to talk about the past. We now have a phrase that if those reporters had had that phrase back in 1954 they would have used it. The phrase is shock and awe. We all know what shock and awe is.

The country in June 1954 was in a state of shock and awe because this report said that men who smoke are 70 times likely to get lung cancer than men who don't smoke, and in some cases the numbers are even higher. So this

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was --
Q. Did it make it into the Arkansas press? I guess it did.
A. The one I'm showing here is June 22nd in Arkansas. Two quick quotes. "The cigarette habit is definitely cutting years from the live expectancy of Americans three prominent researchers of the American Cancer Society told the nations leading medical men here today. Lung cancer deaths are at least three times as common among men with a history of cigarette smoking as among men who never smoked." It made not only the Arkansas Gazette, it made the Arkansas Democrat, it made -- I have looked at the newspapers in Arkansas, Mississippi, Louisiana, Florida and Texas. I have never seen a newspaper, a daily newspaper, I don't deal with the weekly, but I've never seen a daily anywhere that this study was not reported.
Q. So you've got it in the Gazette, the Democrat. Did the religious papers pick it up?
A. The Arkansas Methodist --
Q. Showing that.
A. -- picked it up.
Q. The headline is "Should We Re-evaluate the Cigarette Habit"?
A. The callout is "According to the report" this is the Hammond and Horn report, "the death rate from heart

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disease was 50 percent higher among cigarette smokers than among non-smokers. The lung cancer death rate was assertedly at least five times and possibly 16 times as high among heavy smokers as among those who never smoked regularly."
Q. All right. You mentioned earlier a Gallup poll about this time. What did it reflect?
A. Actually that was an earlier poll. The 1954 poll was have you heard or read that smoking may be a cause of lung cancer. Right after this report came out, Gallup took a poll. Gallup asked have you heard or read anything recently about the American Cancer Society study on smoking? 82 percent of the smokers, 82 percent of the smokers said they had either heard or read about that report.
Q. All right. Professor, what happened next as far as --
A. We have some more. This one is Life Magazine.
Q. And the jury actually saw this during Prof. Kyriakoudes' testimony because we have the coffin nail cartoon as a part of it.
A. Oh, yeah. This is Life Magazine. The subscription rate in Life Magazine was over 5 million, and I think it's a safe estimate to say at least one and a half, maybe two people read each of those. So you've got another 10,

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seven and a half or ten million people seeing this article, or reading this article about the Hammond Horn study.

Q. And this one says, "They die most frequently of either heart attacks or cancer, especially of the lungs"?

A. I said seventy, it was actually 75 percent. Doctors, "Cigarette smokers between 50 and 70 had a death rate higher, some of them as much as 75 percent higher than non-smokers. They die most frequently of either heart attacks or cancer, especially of the lungs."

Q. All right. How about the last one I think you have is Time Magazine from July of 1954?

A. All the major news magazines published this, and I thought this was kind of interesting to include this picture of Hammond on the left, Horn in the middle and Dr. Cameron on the write. John Cameron was the scientific director of the American Cancer Society, but let me read the callout. "Hammond concluded that death from lung cancer is three to nine times as common among cigarette smokers as among non-smokers and five to 16 sometimes as common among those who smoke a pack a day or more."

The reason for the differences in all these figures is they say there's a dose and response function. The more you smoke, the longer you have smoked, the higher the risk is that you get lung cancer.

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Q. All right. What happened next as far as the impact on the common knowledge of the general public?
A. You know what? I just made a terrible mistake. You asked me about the poll.
Q. Yes, sir.
A. I gave you the wrong poll, and I apologize to the jury. The poll I should have quoted was in fact the 1954 poll which came out, the Hammond Horn study. That poll asked have you read or heard that smoking may be a cause of cancer of the lung. That was where it was 90 percent said yes. 90 percent. Okay.

Now, the next major event in the smoking and health issue was the publication of a Hammond Horn study in 1957, and I really -- I really apologize if I confused the jury or anyone else.

'54 was the initial preliminary result.

Q. Okay.
A. That created a 90 percent awareness of smoking as a cause of lung cancer. Then the next big thing came in 1957. In 1957 Hammond and Horn presented their final report. It was this report which is entitled "Smoking in Relation to Death Rates." That was the title of this report. This was published in the summer of 1957. And I've got an Arkansas Gazette and Arkansas Democrat reference to that. Do you have them?

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Q. Yes. I'm sorry. Here is the one from the Democrat. We had the one from the Gazette.
A. On June 4, 1957.
Q. Let's show the one from the Gazette too. I think we had it up here, make sure you saw it. The headline is, "Cigarette Smoking Cuts Life Span Seven to Eight Years".
A. Yeah. Immediately -- let's go one more. Let's go to the next one, Time Magazine. This was not a local reported thing, it was nationwide. This Time Magazine article on June 17th has this callout. "Hammond and Horn reported quote 'a spectacular relationship between smoking and lung cancer.'" It was following this report that Gallup poll took the poll and said have you heard or read about the recent American Cancer Society study on smoking in relation to death rates? In that poll 82 percent of the smokers said yes, they had either heard or read about that study.
MR. CRASS: Your Honor, may we approach just for a moment?
THE COURT: Yes.
(The following proceedings at the bench)
MR. CRASS: Your Honor, I'm about to get into a different area that I don't think I could finish today. Would it be a good time to take a break?
THE COURT: Sure.

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(End of bench conference).

THE COURT: Okay, ladies and gentlemen, we're going to stop for the day and for the weekend, and remember the usual admonitions that I have been giving you everyday, and if you would, just plan to report back and be in the courtroom at nine o'clock on Monday and we'll carry on with the testimony. Have a nice weekend.

(Jury exits).

MR. CRASS: Judge, we had a question, if you've got a minute, that might affect scheduling. We have a witness that, in the event the jury is to consider punitive damages, that the defendant would put on for less than an hour, I guess, 30 minutes maybe, that deals with the punitive damages issues. I think Mr. Sheffler can address this, but I think that's typically been done after the jury has come back on liability and compensatory and they consider punitives.

I didn't know if that was a process the court would allow, or whether the court would want the testimony in our case in chief. Obviously we think it ought to await a determination on liability.

I've indicated to Mr. Holt that actually the two people that we had listed that would address that topic, we have a problem with their scheduling, and there's a third person who would merely give the same testimony. We

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would make that person available for a deposition, but the main thing affected scheduling, whether they need to be here before we rested or could we put that testimony in if and when we reach that point.

THE COURT: Well, I denied the defendant's motion to bifurcate the punitive damages from the compensatory damages. I mean, we've had situations where we send the jury out, they reach verdicts and then they come back and maybe hear initial argument or something. I had not contemplated that we would have a second stage of the trial where we would actually present any testimony.

MR. CRASS: Here I guess is the question I would ask. Because he didn't put in the financials in his case in chief, so would that mean he would not be allowed to do that?

THE COURT: I mean, the rule was that he couldn't put it in until they made a prima facie case on that, but it was never offered. What did you intend on that?

MR. HOLT: Your Honor, I don't care. We agreed, as far as the net worth, it just doesn't matter. It's not required that we put that in on a punitive case and we're not going to do that.

THE COURT: That's what I had assumed, that when you didn't offer any evidence of net worth that it just

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wasn't going to come in.
MR. CRASS: That may moot the point.
THE COURT: I don't know what kind of witness you have.
MR. SHEFFLER: Your Honor, I anticipated that they would make an argument about the net worth, et cetera that was highly inflated and the witness would simply address that, but if that's not going to happen --
THE COURT: As far as I'm concerned, with the plaintiff having rested, they are not going to offer it, if that solves the scheduling problem.
MR. CRASS: I think that does. I would just say under the protective order I need that stuff back.
MR. HOLT: Unless I hear some testimony about what a poor struggling company they are and they don't know how they will pay this judgment, I don't anticipate putting that on, but I'll be happy to give those materials back.
THE COURT: If that's their defense I guess you could put it in in rebuttal.
MR. CRASS: I think, Judge, that this thing is moving fast. Obviously he's got some time with Prof. Sansing, but just for scheduling, do you think we'll be through with proof by Wednesday?
MR. SHEFFLER: I hope so, Your Honor. In fact,

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I plan on it. For planning purposes, Your Honor -- well, we can wait until Woody gets here. We should at some point, I guess early next week, see what the court is going to expect us to allot for closing argument and so on.

THE COURT: Well, we can talk about that. I don't have a rigid rule about that. That's negotiable, I'll put it that way, and we'll talk about it.

MR. CRASS: We better get a mediator.

MR. HOLT: We'll probably come to an agreement.

MR. CRASS: We'll work it out.

THE COURT: We follow Judge Morris Arnold's rule, which is you can take as long as you want as long as you don't take too long. That gives you a lot of guidance I know.

MR. HOLT: I've also heard I'll give all the rope you want including enough to hang yourself.

THE COURT: Mr. Holt, you wanted to talk about plaintiff's exhibit 377?

MR. HOLT: Yes, Your Honor. We want to offer that as an exhibit. It's an ancient document, it clearly is relevant, and it became certainly relevant when the witness takes the stand and says, boy, I've looked at the documents and this was a sincere, sincere belief in what the level of science was when that clearly contradicts

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that.

MR. SHEFFLER: Your Honor, may I make my objection? The objection is the same as it was before, Your Honor, three fold. First of all, there's been absolutely no testimony to establish what this document is. There's been absolutely testimony, and will not be any testimony that establishes the authenticity of the document and, furthermore, Your Honor, I don't think the document is relevant to any issue in the case.

To the extent that the document is being used to say American Tobacco Company knew that smoking was lung cancer, I think would be prejudicial for two reasons. First of all, there's no statement in that document by anybody at American Tobacco Company. There's a representation of a non-statement by many people. However, the only evidence that we have with respect to this document is that the meeting it's reporting about there was an actual statement, in fact, conversation contrary to what the document says. So the truthfulness of the document is called into question as well.

I would submit, Your Honor, that there's been no foundation laid for the document and simply showing it to the witness as it was done did not do that and did not cure it.

MR. HOLT: Your Honor, it is an ancient

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document, it is from the American Tobacco web site --

MR. SHEFFLER: No, it's not, Your Honor. I want to make that very, very clear for the record. This document was never on any web site of any tobacco company in the world. Never.

THE COURT: Well, I don't recall that there was a foundation on that. I'm going to refuse it. I think everything that was important about this document was discussed with this, not the last witness but Mr. Harkness. I'm going to refuse it.

MR. HOLT: Your Honor, I don't want to try your patience but it's Mr. Wilner's document and he knows more about the origin of it than I do and obviously I just made a mistake, because it was my honest belief it was from the web site. If we want to revisit that at some point I hope you won't get angry.

THE COURT: I won't get angry. I may not change my mind, but I won't get angry, I promise you that.

MR. CRASS: Have you ever argued ancient document exception before?

MR. HOLT: Never in 20 something years.

THE COURT: I've never heard it in this court either.

MR. HOLT: There's a lot of things about this litigation I've seen for the first time, Your Honor.

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THE COURT: You all need to take up anything else?

MR. HOLT: I don't think so, Your Honor.

THE COURT: Have a nice weekend. We'll see you Monday.

(Recess)

REPORTER'S CERTIFICATE

I, Pegge J. Merkel, a certified and registered professional reporter, do hereby certify that the foregoing is a true and correct transcript to the best of my skill and ability of the proceedings in the above-entitled matter.

Pegge J. Merkel, RMR

Pegge J. Merkel, RMR
United States Court Reporter

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